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Reports.

(Cited O. C. A.)

Volume XXX.

Cases Adjudged

in the

Courts of Appeals of Ohio.

VINTON R. SHEPARD, Editor.

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Judges of the Courts of Appeals of Ohio.

HON. WILLIS S. METCALFE, *Chief Justice*, Chardon, Ohio.
HON. LEWIS B. HOUCK, *Secretary*, Mt. Vernon, Ohio.

FIRST DISTRICT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

WALTER M. SHOHL Cincinnati
FRANCIS M. HAMILTON Lebanon
WADE CUSHING Cincinnati

SECOND DISTRICT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

JAMES I. ALLREAD Columbus
H. L. FERNEDING Dayton
ALBERT H. KUNKLE Springfield

THIRD DISTRICT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

WALTER H. KINDER Findlay
PHILIP M. CROW Kenton
KENT W. HUGHES Lima

FOURTH DISTRICT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

FESTUS WALTERS Circleville
EDWIN D. SAYRE Athens
WM. H. MIDDLETON Waverly

FIFTH DISTRICT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knos,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

LEWIS B. HOUCKMt. Vernon
ROBERT S. SHIELDSCanton
FRANK N. PATTERSONAshland

SIXTH DISTRICT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

REYNOLDS R. KINKADEToledo
SILAS S. RICHARDSClyde
CHARLES E. CHITTENDENToledo

SEVENTH DISTRICT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

WILLIS S. METCALFEChardon
L. T. FARRLisbon
JOHN POLLOCKSt. Clairsville

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

THOS. S. DUNLAPCleveland
C. G. WASHBURNElyria
WILLIS VICKERYCleveland

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Volume XXX.

Causes Argued and Determined in the Courts of
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COUNTY AND TOWNSHIP DITCHES.

Court of Appeals for Clark County.

Judges Middleton, Sayre and Walters of the Fourth District sitting by
designation in the places of Judges Kunkle, Allread and
Ferneding of the Second District.

JOSEPH CRABILL, JR., v. THE BOARD OF COUNTY COMMISSIONERS
OF CLARK COUNTY, OHIO, ET AL.*

Decided, January 13, 1919.

*Ditches—Procedure for the Alteration and Repair of—Jurisdiction of
County Commissioners—Not Dependent on Refusal of Township
Trustees to Act—Improvement and Repair of Ditches Located in
Part on the Line of a Township Ditch.*

1. The provisions of Section 6517, General Code, are cumulative and are intended to afford petitioners for the alteration and repair of ditches an additional remedy after refusal by the township trustees to act.

* Motion to certify record overruled by the Supreme Court, May 13, 1919, because no error had intervened.

2. This section does not limit or qualify the right of county commissioners to proceed under Sections 6443 and 6452, General Code, and refusal by the township trustees to act as provided in Section 6517, *supra*, is not necessary to give county commissioners the authority to do the things specified in Sections 6443 and 6452, *supra*.
3. County commissioners may alter, improve, or repair a ditch located in part over the line of a township ditch without any prior refusal by the trustees to act in respect to such improvement. *Sollars et al v. Sever et al*, 8 C. C. (N.S.), 364, not followed.

W. Y. Mahar, for plaintiff in error.

Stafford & Arthur and *Keifer & Keifer*, contra.

MIDDLETON, J.

Heard on error.

In December, 1916, certain resident freeholders of this county duly filed a petition with the county commissioners, praying for the construction, widening, straightening, deepening and tiling, as far as practicable, of a ditch on a route beginning,

“At a point in the lands formerly owned by Laura J. Tuttle, in section 9, township 5, range 9, M. R. S., where the tile drains of the Tuttle ditch now empty into an open ditch; thence southerly, following the line of an open ditch or water course, through the said Tuttle lands and the lands of William S. Adams and Ellen W. Alt, in said section 9, and of Joseph Crabill, Jr., in sections 8 and 14, township 5, range 9, M. R. S., to the south line of the right of way of the Detroit, Toledo & Ironton Railroad Company.”

Such proceedings were subsequently had on said petition as that the same was granted by the county commissioners, from which action of the commissioners an appeal was taken by the plaintiff in error to the probate court. The case thereafter came on to be heard in the probate court to a jury, which returned a finding, as required by statute, in favor of the petitioners for said ditch. The plaintiff in error then prosecuted error to the common pleas court of this county, which court affirmed the finding and judgment of the probate court, and he now prosecutes error to this court to reverse all of said judgments below.

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Clark County.

It appears from the record that from the point of the beginning of said ditch, for a distance of 736 feet, the proposed route of the new ditch lies over and along a county ditch, and from that point the remainder of said ditch lies along the route of an established township ditch. The entire length of the proposed ditch is about 4,950 feet; the first 1,600 feet thereof was to be tiled and the remainder was to be cleaned out, deepened and widened.

The main contention of the plaintiff in error is, that under the provisions of Section 6517, G. C., the county commissioners were without jurisdiction to entertain the petition herein, as no application had been made to the township trustees to repair the township ditch involved in the improvement, and that until there was a refusal by the township trustees, as provided for in said section, the county commissioners were without jurisdiction to proceed. In support of this claim attention is directed to the case of *Sollars et al v. Sever et al*, 8 C.C.(N.S.), 364, in which it is held that,

“County commissioners are without authority to locate and establish a ditch in a township ditch until there has been a refusal by the township trustees to act as provided in Section 4510 (R. S.).”

It would seem from the facts, as they appear in the record of this case, if the construction therein given Section 4510 R. S. (now said Section 6517, G. C.), is the proper and correct interpretation of said section, it is decisive of the instant case. We are not, however, convinced that the learned court in that case was correct in the conclusions it reached or that its construction of this section is in harmony with the legislative plan or scheme for the repair of ditches, either county or township as that plan is shown by the whole legislation on that subject. In other words, Section 6517 is to be construed, not only with regard to its express provisions, but in the light of all provisions of the statutory law of this state in respect to the subject of repairing ditches, both county and township. Sections 6443 and 6452, G. C., grant full and complete authority to the county commissioners to do all the things involved in the improvement proposed in the instant case. Section 6644, G. C., gives like

authority to the township trustees. These sections and Section 6517, *supra*, appear to cover the whole field of legislation on this subject.

Without attempting to give a full legislative history of these various sections, it may be said that Section 6443 now appears to be a combination of Section 1 of an act passed March 27, 1851 (58 O. L., p. 49) and Section 1 of an act passed April 25, 1868 (65 O. L., p. 107). Said last named section provided:

“That the county commissioners of any county in this state shall have power, at any regular or called session, whenever in their opinion it is necessary and will be conducive to the health, convenience or welfare of the public, in case where any ditch, drain or water course has been established and constructed under the provisions of the act to which this is supplementary, to cause the same to be cleaned out, widened or deepened, as hereinafter provided.”

While the jurisdiction of the county commissioners was limited in this section to county ditches, that limitation seems to have been removed at some subsequent time, and as Section 6443 now stands it expressly provides that the county commissioners may straighten, widen, alter, deepen, box or tile any ditch. This is also true of Section 6452, G. C., in which provisions are found equally as broad and comprehensive. Section 6644 was first enacted March 9, 1866, and may be found in Vol. 63 O. L., p. 38, and as then passed provided:

“That the township trustees of any township in this state shall have power, whenever in their opinion it will be conducive to the health, convenience or welfare of the public, in cases where any ditch, drain or water course has been constructed under the provisions of the act to which this is supplementary or otherwise, to cause the same to be cleaned out, deepened, widened or repaired, as hereinafter provided.”

The act to which this section was supplementary was an act authorizing township trustees to construct ditches. But it is important to observe that their activities in the repair of ditches were not limited in the above section to township ditches, but included all ditches “otherwise” constructed.

At the time of the enactment of Section 6517 all of the foregoing sections contained practically the same provisions that they

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Clark County.

now have. So that at the time of the enactment of said section both the board of county commissioners and the board of township trustees were fully authorized under said sections to repair any ditch, either county or township, and each had in respect thereto equal and concurrent authority. The construction, therefore, of this section as given by the learned court in *Sollars v. Sever, supra*, makes its provisions apply to the repair of county ditches by county commissioners the same as they would apply to township ditches. There is nothing in its provisions by which they may be limited to the repair of township ditches. The section makes no distinction whatever between county and township ditches, but by its express provisions it is made applicable to any ditch provided for in the title under which it is found. That title includes all of the sections hereinbefore noted. It follows from this that if Section 6517 is intended to be jurisdictional and that the Legislature proposed by its provisions to subordinate the right of county commissioners to repair ditches to an action first by the township trustees, and to make the right of the county commissioners to act in the repair and improvement of ditches dependent upon the refusal of the township trustees to so act, we have in its provisions an implied repeal of all the authority granted to the commissioners in Sections 6443 and 6452, *supra*. This is further evidenced by the fact that said Section 6517 provides a complete plan for its execution and specifically provides how county commissioners shall proceed.

It is unnecessary to discuss the law of repeal by implication. It is a familiar rule of statutory construction that such repeals are not favored, and that a statute will not be construed as repealing by implication prior acts on the same subject unless there is an irreconcilable repugnancy between them and it is plainly evident that the Legislature intended the new law to completely supersede the old.

The jurisdiction granted to the county commissioners in Sections 6443 and 6452, *supra*, is expressed in terms plain, positive, direct and unqualified. Unless the jurisdiction thus granted is repealed by terms equally plain and unqualified in Section 6517, we do not feel warranted in saying that the latter section is controlling, but must regard it as merely cumulative and not as abrogating the former law. This we do for the following reasons:

It is a familiar principle that when two courts have equal and concurrent jurisdiction in respect to the same subject-matter, the one first obtaining jurisdiction retains it and determines the questions involved. As a corollary to this, when such tribunal exercises its jurisdiction and determines the matter submitted its action concludes all parties, the subject litigated is *res adjudicata*, and the jurisdiction of both tribunals as to that particular subject is exhausted and at an end. These principles apply also to boards of quasi judicial functions, like county commissioners and township trustees. (*Marsh v. Commissioners*, 26 Weekly Law Bull., p. 3; see, also, 33 Weekly Law Bull., pp. 121-131.)

Prior, therefore, to the enactment of said Section 6517, when a petition for an improvement like the one involved in this proceeding was presented to the township trustees and they refused to act, the petitioners were concluded by their decision. By the enactment of this section the Legislature intended to give such parties, under such circumstances, a further remedy by expressly empowering the commissioners to entertain their petition, notwithstanding it had been refused by the township trustees.

This section, therefore, is merely cumulative and affords an additional remedy only, and gives additional jurisdiction to the county commissioners to act in the repair and improvement of ditches.

We are, therefore, unable to accept the construction adopted in *Sollars v. Sever*, *supra*, and must hold in the instant case that the county commissioners were fully empowered to entertain the petition and act upon it, notwithstanding a part of the ditch proposed to be improved and repaired was over and along the line of a township ditch, and that no application for said improvement had theretofore been made to the township trustees.

To the further contention of the plaintiff in error that the verdict and finding of the jury was and is against the manifest weight of the evidence, it is sufficient to say that there is ample evidence in our judgment, as disclosed by the record, to sustain the finding and verdict of the jury.

Judgment affirmed.

SAYRE, J., and WALTERS, J., concur.

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Hamilton County.

**EMPLOYEE OF OHIO COMPANY INJURED OUTSIDE
OF THE STATE.**

Court of Appeals for Hamilton County.

THE INDUSTRIAL COMMISSION OF OHIO, WALLACE D. YAPLE, M. B
HAMMOND, AND T. J. DUFFY, COMPRISING THE SAID COM-
MISSION, v. LENA WARE.

Decided, 1919.

Workmen's Compensation Act—Not Applicable to Employee of Ohio Company—But Injured Outside of the State, When—Claim of Lawful Wife not Barred by Bigamous Marriage—Evidence—Jury May not Return a Verdict Fixing Compensation to be Paid in a Lump Sum.

1. The Industrial Commission of Ohio is not liable for the death of a workman occurring outside the state, when he was neither hired in Ohio, nor employed to work there, merely because he was in the employ of a concern that complies with the Ohio workmen's compensation law.
2. The workmen's compensation law may have some extra territorial operation.
3. The fact that the decedent had contracted a bigamous marriage does not bar the claim of his lawful wife.
4. A question to a witness is not improper as tending to impeach a witness previously called by the same party merely because the answer might incidentally reflect upon such other witness. If the evidence to be elicited thereby tends to prove any fact relevant to the issues.
5. In cases arising by way of appeal from the decision of the Industrial Commission denying the right of a claimant to participate in the state insurance fund, a jury is without power to return a verdict fixing compensation to be paid in a lump sum.

John V. Campbell, Prosecuting Attorney and Henry G. Hauck, Assistant Prosecuting Attorney, Attorneys for Plaintiff. Fulford, Shook & Wilby, contra.

SHOHL, J.

Lena Ware brought suit against the Industrial Commission of Ohio in the court of common pleas of Hamilton county, Ohio, alleging that she was the widow and dependent of Sam Ware,

who was killed in the course of his employment while working for Platt & Dickinson, contractors, who were members of and participants in the state insurance fund of Ohio. Compensation had been refused by the commission. Judgment was rendered in her favor in the court of common pleas, and the Industrial Commission brought the case to this court on error. This court decided that the trial court was without jurisdiction and reversed the case on that ground.

Lena Ware then took the case on error to the Supreme Court, and that court reversed the judgment of the court of appeals, and by its mandate directed this court to consider all the allegations of error.

The case was again presented and is now submitted to this court for decision. We are guided only by the mandate of the Supreme Court from which it is apparent that the tribunal regarded the provisions of Section 1465-90, requiring the action to be brought in the county in which the injury occurred, to be directory and not mandatory. Other questions were argued in the briefs, but not decided.

The most important question arose out of the overruling by the court of the motion for judgment on the pleadings, filed by the Industrial Commission. The petition which is required by statute, Section 1465-90, to be in ordinary form, after alleging the representative capacity of the members of the Industrial Commission says:

“Appellant further states that she is the widow of Sam Ware, deceased, and that at the time of his death, and prior thereto she was his wife, and as such dependent upon him for support. That on or about the 30th day of July, 1915, her said husband, Sam Ware, was employed by Messrs. Platt & Dickinson, brick work contractors who were members of and participants in the state insurance fund of Ohio; that while working for said Platt & Dickinson, in Covington, Ky., a brick fell from the top of the structure on which he was working for the said Platt & Dickinson, causing his death, on or about the said 30th day of July, 1915. That at the time he was killed, as aforesaid, and prior thereto, he was working as a hod carrier and receiving wages of \$3.40 per day.”

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Then follows a statement of the application to the commission, and the disallowance of the claim.

The foregoing extract contains all the averments in respect to the employment and the injury of Sam Ware.

It will be noted that it is not averred that the contract of employment was made in Ohio, or that the labor was to be performed in Ohio. It does appear that the injury took place in the State of Kentucky.

The bald question is presented as to whether the Industrial Commission of Ohio can be liable for injuries to a workman neither hired in Ohio, nor employed to work there, because he is employed by a concern that does comply with the Ohio laws. The record discloses no evidence in respect to these matters, absence of which in the pleadings has just been noted.

There are at least three different types of questions that arise in consideration of the extra territorial operation of the workman's compensation law. An Ohio employer may hire a workman who lives in Ohio in different ways. First, a workman may be employed in Ohio to do work partly or primarily in Ohio, and be injured while temporarily or casually out of the state. Second, a workman may be employed in Ohio to do work entirely outside the state, and receive injuries at such place of work. Third, a workman may be employed outside the state of Ohio to do work entirely beyond the limits of the state, and be injured at the place of work.

It will be seen that the foregoing examples are not intended to be exhaustive of the possible situations.

An illustration of the first type of case is *Spratt v. Sweeney & Gray Company*, 168 App. Div. (N. Y.) 403. There an employee was required to go from New York into New Jersey for two days. His absence from New York was regarded by the court as a mere incident to the employment within the state.

The second type is illustrated by the case of *Gardner v. Horseheads Construction Co.*, 171 App. Div. (N.Y.) 66. It was adjudicated in that case:—

“Where an employee of a general contractor, with an office in this state, has not performed any services here for several years,

and his contract of employment did not contemplate any work within the state, no recovery may be had under the statute for his death sustained while employed in the state of Pennsylvania. He was engaged in an independent service in a foreign state, which employment does not come within the benefit of the statute."

It is interesting to note that while the decision in the case of *Post v. Burger & Gohlke*, 216 N. Y., 544, has language which might appear to be inconsistent with the Gardner case, the facts in the Post case are regarded by the court, at page 68 of the opinion in 171 App. Div., as distinguishing. Further color is given to the inference that the cases are not in conflict by the decision in the case of *Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9 (119 N. E. 878), wherein both the Post case and the Gardner case appear to be cited with approval.

So far as we have been able to determine there never has been any decision stating that a case of the third type was within the provisions of the Workmen's compensation law.

Judge Merrell, of the superior court of Cincinnati, in the case of *Cody v. Packet Co.*, 15 N.P.(N.S.), 529, states that a case of the so called third class would not give the injured person any right to relief, regarding it as falling within the rule of *Alexander v. Pennsylvania R. R. Co.*, 48 O. S., 623.

It becomes important to determine the nature of the right of the injured person rising under the compensation law. That question is the subject of an article by Ernest Angell, 31 Harvard Law Review, 619. The author states that text writers and courts have demonstrated that the right to claim or the duty to pay compensation does not arise out of tort. A discussion follows as to whether the duty or right are imposed by law or arise from the relation, after the relation has been created by contract. The American authorities are commented upon. The general subject is likewise discussed in the note in L. R. A., 1916 A, 443, and in the decision of *Gooding v. Ott*, 87 S. E., 862 (W. Va.), L. R. A. 1916 D, 637.

The authorities are not uniform and we regard it as improper to express our views now upon cases of the second type because that question is not before us. However, we regard the decision

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of the Supreme Court in this case as necessarily implying that there may be liability in a case of the first type. If there could not have been any extra territorial operation of the workmen's compensation law, it would have been useless for the Supreme Court to have directed us to consider the other errors assigned.

Whether an injured workman can recover compensation from the commission, when he is employed in Ohio to do work entirely without the state, or whether a workman employed outside the state to do work partly within and partly without the state, has any rights must be left for adjudication when those cases arise. It is clear that to come within the policy of the statute the claimant must be an Ohio workman. He must be either employed in Ohio or employed to work in Ohio. So far as the allegations of the petition show neither of these elements was present. There is no room for a difference of opinion as to the construction of the allegations of the petition. There can be no possible inference to be drawn of the plaintiff to the effect that because he was working for a contractor of Ohio, or he made his contract there, or that his contract called for work to be done there. Without either of these averments it can not be said that the petition alleges that Ware was an Ohio workman. It follows, therefore, that the court below erred in overruling the motion for judgment.

The question of the dependency of plaintiff upon Sam Ware was argued at great length. Many of the questions are foreclosed by the affirmance by the Supreme Court of the case of *Musselli v. Industrial Commission*, 28 O. C. A., 97. If plaintiff can bring herself within the rules laid down in that case, the fact that Sam Ware had contracted a bigamous marriage would not bar her right to recovery.

The Industrial Commission offered evidence of Gabriel Rohn. He was asked whether he knew with whom Lena Ware was living. The question was one of a series of questions whereby the commission offered to prove that plaintiff was living with William Carroll as man and wife. The commission had already offered Carroll as a witness. Objections was made to the questions asked Rohn in regard to the conduct of plaintiff and Carroll. The objection was on the ground that it constituted an impeachment of defendant's own witness, and was sustained by the court. The

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question was proper, and the mere fact that the answer might incidentally reflect upon a person who had previously been a witness did not render improper the evidence to be elicited thereby, if such evidence had a tendency to prove any fact relevant to the issue in the case. *Hurley v. State*, 46 O. S., 320, 322; 1 Greenleaf on Evidence, Section 442, 443b.

The court awarded judgment for a lump sum. The law is that in cases arising by way of appeal from the decision of the Industrial Commission, denying the right of the claimant to participate in the state insurance fund any award, must provide for periodical payments and not a lump sum. *Roma v. Industrial Commission*, 97 O. S., 247. Had this been the sole error, we would have directed a modification of the judgment. In view of the other errors, however, the judgment will be reversed.

JONES, P. J. and HAMILTON, J., concur.

LIABILITY UNDER A LEASE.

Court of Appeals for Cuyahoga County.

J. M. HALLIDAY v. G. L. TAFT.

Decided, January 20, 1919.

Landlord and Tenant—Leased Premises Abandoned before Fully Occupied—Lessee Liable for Rent until New Tenant was Found.

Under a written lease covering a dwelling, upon which \$20 was paid at the time the lease was executed, the refusal of the tenant after entering into possession and partial occupancy to carry out the further terms of the lease because of some alleged interference on the part of the landlord, entitles the latter to judgment for the full amount of rental falling due until such time as another tenant could be secured.

R. W. Jeremiah, Esq., for plaintiff in error.

Jacob H. Schoen, Esq., contra.

GRANT, J.

Error to the Municipal Court of Cleveland.

The plaintiff declared on a written lease for the rental of a property of his at \$480 for the year, the same to be paid in

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sums of forty dollars for each month, in advance. The defendant paid twenty dollars at the time the bargain was struck, and no more at any time. There was no counter-claim.

The trial below was to the court. There was evidence which the court had a right to believe, and which to make the judgment consistent the court did believe, tending to show the following facts: After the execution of the lease and the initial payment on it, the defendant sought and obtained permission from the plaintiff's tenant then occupying it, whose term had not at the time ended, to store some of his goods in the house, which he did. He bought from the outgoing tenant an individual lock, which the latter had put on the door to prevent intrusion by the landlord, with its key. The defendant's family, for the purpose of cleaning it at least, exercised acts of occupancy in the house, and were for all purposes of the action in actual possession of the premises.

After this the defendant concluded to go back from his bargain and moved into other premises which for some reason appeared more satisfactory to him. The excuse alleged was that the plaintiff was disposed to interfere—too furtively, as his wife thought—with the latter in her operation of scrubbing the floor. He told the plaintiff he would not abide by his contract, doing some blustering, as the latter says, about the lease not being worth the paper it was written on, saying he was in the government service and so bullet-proof as far as collections were concerned, and making the usual inconsiderate talk of the man who is proud of being independently poor.

The landlord, however, was not affected by the terrors surrounding government understrappers, and in effect answered, as did Paul the Apostle when he sent back the box of compound cathartic pills to the elders of the Church at Ephesus, "None of these things move me," and notified the tenant that he should hold him to his bargain.

By its terms the lease was to become operative November 1st.

After the defendant informed the plaintiff that he would no longer occupy his house, the latter made seasonable and suitable efforts to rent the property to others, advertising it in the newspapers. He, however, obtained no other tenant, and about the middle of January sold the property. The sale seems to have

been absolute as of that date, no right of possession beyond that time being reserved by the deed or otherwise, so far as appears. The purchaser did not in fact take possession until some time in the early part of February. We express no opinion upon the effect of this retention of possession through the entire month of January, as it is not material in the view we take of the case.

The plaintiff sued for one hundred dollars, being the rental for the months of November, December and January, at the agreed rate of forty dollars a month, less the twenty dollars down payment. He is entitled to recover, upon the facts which the trial court must have found in order to allow him any sum at all, the rents at least for November and December, which, applying the credit of twenty dollars paid in hand, would amount to sixty dollars. For this sum, and for no less—leaving out the month of January, in the course of which the sale of the premises was made—judgment should have been rendered, if any judgment at all was rendered.

Without rhyme or reason, so far as we can see, the judgment actually rendered was for twenty dollars only.

The plaintiff prays to have it reversed.

The prayer is granted.

DUNLAP and WASHBURN, JJ., concur.

LIABILITY FOR ASSAULT COMMITTED BY AN EMPLOYEE.

Court of Appeals for Lucas County.

HARRY H. MOON ET AL V. ERNEST O. CONLEY.

Decided, January 21, 1918.

Assault—Measure of Duty Resting on Proprietor of Hotel and Bar—Where a Patron is Assaulted by an Employee while off Duty—Patrons Entitled to Protection from Insult, Annoyance or Danger—Charge of Court.

The proprietors of a hotel and bar operated in connection therewith owe to a patron the duty to exercise ordinary care to protect him from an assault and battery by another patron or by an employee, and are liable for the damages resulting from the assault and

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battery, if, by the exercise of ordinary care they could have prevented the same.

P. J. Phelan, for plaintiffs in error.

M. D. Merrick, contra.

RICHARDS, J.

Error to the Court of Appeals for Lucas County.

The plaintiffs in error, Harry H. Moon and Charles W. Boisoneau, were partners operating a hotel and bar in connection therewith on Huron street in the city of Toledo. One of their employees was a man named Charles Brown. The original action, out of which this proceeding in error grows, was brought in the court of common pleas by Conley for the purpose of recovering damages for an assault and battery claimed to have been committed on him by Charles Brown, while an employee of Moon and Boisoneau and in their place of business. The trial resulted in a verdict and judgment in favor of Conley in the sum of two hundred dollars against the defendants, Moon and Boisoneau. The plaintiff claimed that he was a guest and patron of the hotel and bar and that the assault and battery was committed by Brown while a servant of the other defendants, and that this occurred in the presence of the defendant Moon. The transaction was on November 24, 1916, in the bar-room attached to the hotel operated by the defendants, Moon and Boisoneau. Conley and Brown had been playing a game of cards known as rummy. After playing one game peaceably, a quarrel arose between them, and in that quarrel Conley was struck in or near the eye and seriously injured. He contends that the defendants, Moon and Boisoneau, violated their duty to exercise ordinary care for his protection as a guest and patron in their place of business. The testimony, as is usual in cases of this character, is directly in conflict.

An examination of the charge to the jury discloses no error to the prejudice of the defendants below. In the course of the charge to the jury, the trial judge used the following language:

"Now, gentlemen, consider the evidence in the case, and if you find from the evidence that Brown assaulted Conley, that is, wrongfully struck him, and did this in the presence of the de-

fendant Moon in the bar of the hotel, and the defendant Moon, by the exercise of reasonable precautions upon his part, could have prevented the alleged assault and injury, and did not do so, the plaintiff, Conley, is entitled to recover the damage he suffered thereby."

This, we think, is a fair statement of the law on the issues between the parties. It is substantially in accordance with the rule laid down in 14 R. C. L., 506, 508. On the latter page of the authority cited we find this language:

"A proprietor of any public house of entertainment may be answerable for the act of one of his patrons as well as of his servant. He owes a duty to those that come to his place to protect them from insult and other annoyances or dangers. But by the great preponderance of authority, this duty is not absolute, but is limited to the exercise of reasonable care, and the proprietor is liable only when he is negligent."

We take this to be a fair statement of the measure of duty resting on Moon and Boissoneau on the occasion under investigation. And while the evidence as to whether that degree of care was exercised is in serious conflict, yet we can not say that the finding of the jury is so manifestly against the weight of the evidence as to justify a reversal of the judgment. The evidence tends to show that although Brown was an employee of the other defendants, he was not on duty that evening, but he and the plaintiff, Conley, were both at the time patrons of the bar which was being attended by the defendant Moon. Moon claims, in his testimony that he did what he could to prevent the parties entering into the quarrel and to separate them, but this is in direct conflict with the testimony of the plaintiff, whose testimony is to the effect that he was assaulted by Brown in the presence of Moon, and that he, at numerous times, called on Moon for protection from Brown. The issues of fact between the parties were fairly submitted to the jury, and, finding no prejudicial error, the judgment will be affirmed.

CHITTENDEN and KINKADE, JJ., concur.

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**APPEAL FROM AN APPRAISAL UNDER THE MIAMI
CONSERVANCY ACT.**

Court of Appeals for Butler County.

PATRICK BRADY V. THE MIAMI CONSERVANCY DISTRICT.

Decided, June 4, 1919.

Appeal by Land Owner—Dissatisfied with Appraisal of Benefits as Made under Conservancy Act—Character of the proceeding—Burden of Proof—Verdict.

1. A land owner in the Miami conservancy district, who appeals from the appraisal of benefits made in his case, has the burden of proof to establish that the finding and judgment of the Conservancy Court exceeds the actual benefits conferred.
2. In such a case complaint does not lie that the court charged a concurrence of all twelve jurors was required to return a verdict, where it appears that the verdict was unanimous against the land owner and he was therefore not prejudiced by the fact that the court required it should be returned by the full jury.

*E. A. Belden and Boyd & Bake, attorneys for plaintiff in error.
W. C. Shepherd, J. F. Neilan and B. F. Harwitz, contra.*

SHOHL, P. J.

This is a proceeding in error by Patrick Brady against the Miami conservancy district. In order to understand the case as a whole, it will be necessary to recite certain matters of general public knowledge.

The Miami conservancy district is a body corporate and a public subdivision of the state of Ohio, duly established and organized under what is known as the Conservancy act of Ohio, enacted after the disastrous flood of 1913, being Sections 6828-1 to 6828-79, inclusive, of the General Code of Ohio. Its general purpose was to prevent floods in the valley of the Miami river and its tributaries, and to protect life and property. The validity of the act has been determined by the Supreme Court of Ohio.

Miami County v. Dayton, 92 O. S., 215, and by the Supreme Court of the United States, *Orr v. Allen*, 248 U. S., 35. The district was established and organized in June, 1915, by a decree of the common pleas court of Montgomery county, and embraces lands in the nine counties of Hamilton, Butler, Warren, Preble, Montgomery, Greene, Clark, Miami and Shelby.

In May, 1916, the board of directors of said district, as provided by law, duly adopted an official plan, which plan provided for the construction and maintenance of dams, retarding basins, levees and other works designed to accomplish the purpose for which the district was organized. Objections having been made thereto, the plan and the objections were duly submitted to said court, and on November 24, 1916, the objections were heard and overruled, and the plan was approved by the court, and thereby became and is now the official plan of said district. Pursuant to the act, three appraisers were appointed and qualified by said court and on May 9, 1917, they filed their report designated and referred to as the appraisal roll, showing therein, among other things, their appraisal of the value of the lands and certain interests in lands and other property required to be taken for the execution of said plan, and also their appraisal of the benefits to accrue from the execution of said official plan to the real estate which was owned by the plaintiff in error.

In accordance with the act, plaintiff in error filed exceptions to said appraisal of benefits, which said exceptions were heard and overruled by the court on July 30, 1917, and on that date the court modified and amended the appraisal, and as so amended approved and confirmed it, including said appraisal of the benefits to accrue to the property of Patrick Brady. Patrick Brady thereupon perfected an appeal from said decree with respect to the amount of award of benefits assessed against his property, and gave bond as required by law. Thereafter, the court ordered the said Miami conservancy district to file in the common pleas court of Butler county, in which the lands of Patrick Brady were located, a petition embodying the facts and the claim that the conservancy district made with respect to the said benefits, and this petition was filed. Patrick Brady filed an answer

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admitting the allegations of the petition, excepting that the assessment was made under a uniform rate and averring that the benefits assessed against his property were excessive.

The case was tried to a jury and a verdict was rendered finding that the real estate of Patrick Brady would receive benefits from the execution of the official plan of the Miami conservancy district in the amount shown by the appraisal roll, as set out in said petition. A motion for a new trial was overruled, and judgment was entered on the verdict, to which Brady now prosecutes error. His contentions are that the court erred in its charge to the jury that the burden of proof was on the land owner to show that the benefits assessed by the appraisers and confirmed by the court were excessive. He also charges as error that the court charged that the verdict required the concurrence of all twelve jurors to render a verdict.

Proceedings under the conservancy act differ from any other proceeding known to the Ohio law. The act regulates proceedings in conservancy and nothing else, and its provisions are peculiar to the problems arising out of the flood situation and the relief to be provided for. In order to understand the nature of the so-called appeal thereby granted, an examination of the entire act is necessary, but we shall refer to a few of the most important provisions. Section 26 provides that:

“* * * the court shall appoint three appraisers whose duty it shall be to appraise the land or other property within or without the district to be acquired for the right of ways, and reservoirs and other works of the district and to appraise all *benefits* and damages accruing to all lands within and without the district by reason of the execution of the official plan. * * *

This section also provides:

“* * * That each appraiser shall, before taking up his duties, take and subscribe to an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will make a true report of such work done by him. * * *

Section 27 provides:

“* * * * When the official plan is filed with the secretary of the district he shall at once notify the board of appraisers and

they shall proceed to appraise the benefits to all real property within and without the district, which will result in the organization of said district and the execution of said official plan."

Section 30 of said act provides:

"* * * The board of appraisers shall prepare a report of its findings which shall be arranged in tabular form and bound in book form, which shall be known as the conservancy appraisal record. Such record shall contain the name of the owner of the property appraised as it may appear on the tax duplicate or the deed records, a description of the property appraised, the amount of benefits appraised, the amount of damages appraised, etc.
* * *"

Section 31 provides:

"* * * Upon filing of the report of the appraisers, the clerk shall give notice thereof as provided in this act in each county of this district. * * *"

Section 32 provides:

"A property owner may accept the appraisal in his favor of benefits or damages or many acquiesce in their failure to appraise damages in his favor and shall be construed to have done so unless he shall within ten days after the last publication provided for in the preceding section file exceptions to said report or to any appraisal of either benefits or damages, etc. * * * all exceptions shall be heard by the court. * * * The court may, if it deems necessary, return the report to the board of appraisers for their further consideration and amendment, etc.
* * *"

Section 33:

"If it appears to the satisfaction of the court after having heard and determined all said exceptions that the estimated cost of making the improvement contemplated is less than the benefits appraised, then the court shall approve and confirm said appraisers' report * * * and such findings shall be final and incontestable." .

Section 34:

"Any person or public or private corporation desiring to appeal from an award as to compensation or damages or benefits

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shall within ten days of the judgment of the court confirming the report of the appraisers file with the clerk of the court a written notice making demand for a jury trial. He shall at the same time file a bond with good and sufficient security to be approved by the clerk in the sum of not more than \$200 to the effect that if the appellant does not recover more by the verdict of the jury than the sum awarded by the appraisers or if the verdict is not more favorable to him he will pay costs of the appeal. He shall state definitely from what part of the order he appeals. The appeals shall be from the award of compensation or benefits or damages or one or more of them, but from no other part of the decree of the court. * * * In case an appeal is taken to a jury from the assessment of benefits the court shall direct the directors to present the petition embodying the facts and the claim they make in short form, which shall be filed in the county in which the land is situated. Whereupon a jury shall be empaneled according to law to try the issue presented."

The act directs "a jury shall be empaneled according to law to try the issue presented." What, then, is the issue presented? When we ascertain that, the established principles of procedure will apply and will fix the burden of proof. The burden is upon him who asserts the affirmative of the issue whether he happens to occupy the position of plaintiff or defendant. *Commissioners v. Whisler*, 82 O. S., 234, 235.

From all of the foregoing it appears that there is provided a special method of attack on the determination by the board of appraisers and the court in respect to the benefits. While it has been designated an appeal, in determining its nature and in construing how the Legislature intended it to operate, consideration may be given to the character of the finding which it is to review.

By the English common law, the judgments of inferior courts were brought under the review of the King's Bench for revision and correction by writ of error, writ of certiorari, or writ of false judgment. In courts which derive their procedure from the civil law, namely, equity, admiralty and ecclesiastical courts, the process for reviewing all decrees is designated an appeal. 3 *Corpus Juris*, 299. In popular parlance the word "appeal" is frequently used to cover other methods of review than that

which is technically and properly so called. *Miami County v. Dayton*, 92 O. S., 215, 218. The Constitution, Article IV, Section 6, provides for appeals to the court of appeals in chancery cases and indicates a well defined and well known method of procedure whereby the whole case is tried anew. Such, however, does not appear to have been contemplated by the conservancy act, which specifically limits the matters to be passed upon at the jury trial to three specific questions only: compensation, damages and benefits.

The imposition of the assessments under the act is in the exercise of powers of taxation, and is not the taking or condemnation of property. The matter of taxation should not be confused with the power of eminent domain. Each is governed by its own principles. *Houck v. Little River Drainage District*, 239 U. S., 254, 264.

The remedies of property holders in resisting assessments vary throughout the several states, and there are several methods by which assessments are attacked. See 2 Page and Jones, *Taxation by Assessment*, Ch. 25.

The conservancy act has been compared by the Supreme Court in the Miami county case (*supra*) to the drainage district laws of some of the other states. We have made an examination of such laws, and while they do not control in ascertaining the meaning of our conservancy act which depends upon the intent of the Ohio Legislature, yet they reveal the origin of some of the language and provisions of the Ohio act and are illuminating when we undertake to construe it. See Rev. Stat. of Missouri, 1909, Ch. 41, Hurd's Rev. Stat. of Ill., 1917, Ch. 42, Burns' Annot. Stat. of Ind., Ch. 56 and cf. Section 6143, Code of Iowa Suppl. 1913, Title and Ch. 2-A and cf. 1989, A14.

In Missouri the issue is (Section 5560) "whether the assessment of benefits * * * is too high." And in all the instances found the complaining party, the "remonstrant" or "appellant" has the burden of proof. *Freesen v. Scott County Drainage Dist.*, 283 Ill., 536; *Rogers v. Venis*, 137 Ind., 221; *Conwell v. Tate*, 107 Ind., 171, 172; *Collins v. Board of Supervisors of Pottawattamie County*, 158 Iowa, 323; *Beals v. Brookline*, 174

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Mass., 1; *Catron v. Deep Fork Drainage Dist. No. 1*, 35 Okla., 447; Page & Jones Taxation by Assessment, Section 923.

Plaintiff in error cites *Commissioners v. Whisler*, 82 O. S., 234. The appeal authorized under the statute there in question was an appeal from the entire judgment of the commissioners, and the final determination of all matters was left to a trial *de novo* in the probate court. The distinction between such a case and the partial appeal on the sole question of the amount of benefits is made in the case of *Conwell v. Tate*, *supra*. The assessments levied under the conservancy act more nearly resemble street assessments in accordance with benefits authorized under the municipal laws of this state. In those cases there is a determination by the municipal council that corresponds to the adjudication by the conservancy court.

As a general rule, the decisions of officers and tribunals specially created and charged, in tax laws, with the duty of fixing valuations for tax purposes, are final and conclusive. *Wagoner v. Loomis*, 37 O. S., 571; *Haggerty v. Huddleston et al*, 60 O. S., 149, 165; *McKnight v. Dudley*, 148 Fed., 204, 206.

And when an assessment has been levied the property holder must establish that it is excessive. *Cormany v. City of Cincinnati* (decision by this court March 24, 1919); *Spanger v. Cleveland*, 43 O. S., 526, 536, 537.

The form of the bond required to be given by the property holder who appeals indicates that the question at issue is only whether or not the assessment for benefits should be reduced. If the whole matter were to be tried *de novo* there might conceivably be a finding by the jury that the benefits were greater than the amount assessed. The act does not disclose that the complaining property holder can be more unsuccessful than to fail to change the amount assessed. He can not make himself liable to an increased assessment by the result of the appeal. He was the remonstrant before the conservancy court to sustain his claim that the amount fixed by the appraisers was excessive and his appeal gives an opportunity to raise that same question in a jury trial. The appeal, then, is a short method for the property owner to attack the assessment. The issue presented,

is whether the finding and judgment of the court as to the benefits exceeds the actual benefits conferred. The affirmative of that proposition is maintained by the appealing property owner and the burden of proof is on him. It follows, therefore, that the court was correct in instructing the jury that the burden was upon the defendant.

Complaint is also made by the plaintiff in error that the court charged that the concurrence of all twelve jurors was required to render a verdict. The jurors were unanimous in their decision against him. It could not therefore have been prejudicial to him to require a unanimous verdict even if the law were that a verdict by nine jurors is sufficient. The result here shows that he is merely claiming that three more jurors found against him than the law required. It is unnecessary therefore for this court to consider whether or not there was error in that regard.

The judgment will be affirmed.

HAMILTON and CUSHING, JJ., concur.

GUARD RAILS ON CERTAIN STREET LINES.

Court of Appeals for Cuyahoga County.

FLORENCE DALTON, AN INFANT, BY THOMAS DALTON, ETC., v. THE CLEVELAND ELECTRIC ILLUMINATING COMPANY.

Decided, January 13, 1919.

- . *Guard Rails—Application of Ordinance Requiring Erection of—
Whether Applicable to an Interior Areaway a Question for the Jury.*

Whether an ordinance requiring owners of property along street lines and on areaways back from streets, where the level is above that of the street, to erect guard rails to prevent injury to persons passing by, applies to the owner of a lot which he had permitted to be generally and extensively used for many years by persons on foot and by vehicles, as a passage way leading from a street to an alley and along which and adjoining his building he has constructed a side walk and a paved drive way, is a question

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for the jury, and a determination by the court that the ordinance was without application and inadmissible in evidence, as a matter of law, constitutes error requiring a reversal of the judgment based thereon.

Payer, Winch, Minshall & Karsh, for plaintiff in error.
Squire, Sanders & Dempsey, contra.

WASHBURN, J.

Error to the court of common pleas.

Plaintiff in error, a child about four years of age, while playing on the property of defendant in error, in the city of Cleveland, Ohio, fell into an areaway and broke her arm. She brought suit to recover for her injury. At the trial, in support of the allegations of her petition, she offered certain ordinances of the city of Cleveland which she claimed required the defendant in error to guard said areaway by a railing along the same. Objection to this evidence was sustained and exception duly noted. At the close of plaintiff's evidence the trial court sustained the motion of defendant in error for a judgment in its favor, to which ruling plaintiff in error excepted, as she also did to the overruling of her motion for a new trial.

The theory of the defendant in error which seems to have been the basis of the court's action, was that the plaintiff in error was a trespasser, or at least a bare licensee to whom the defendant in error owed no duty which it violated, and that the ordinances in question were not applicable to the situation, or did not create a duty to the plaintiff in error.

The evidence, as shown by the record, tended to prove that the ground where the plaintiff in error was injured, which was a part of a vacant lot, had been used for more than twenty-one years as a passageway from the street to an alley, along which were manufacturing plants, and that it had been very generally and extensively used by persons on foot and by vehicles of all descriptions; that about three or four years before the accident the defendant in error constructed a building on the portion of said lot just west of said passageway, and that on the east side of said building and along said passageway it constructed an

areaway about 16 or 18 inches below the surface of the ground, and that it built a coping along the edge of said areaway about 12 or 15 inches high, so that the areaway was a little less than three feet deep from the top of the coping. This areaway was along the east side of said building, and the defendant in error constructed along the east side of the areaway and immediately adjoining it a stone sidewalk leading from the street to the rear of the building, and also paved said driveway, which immediately joined said sidewalk on the east.

Said driveway, after said improvements were made, continued to be extensively used by the public in going from said street to and along said alley, and in the photographs in the record it has the appearance of being a street, but it is conceded that it is, in fact, private property.

The ordinances in question require protection by railings along areaways along street lines and also along areaways back from the street, but for whose protection the railings along areaways back from the street are required is not stated, and we need not determine in this case; nor does it appear how deep the excavation must be in order to be an areaway within the meaning of the ordinances.

In view of the situation disclosed by this record, we do not feel that it was the province of the court to determine, as a matter of law, that a railing along the areaway in question was or was not required by said ordinances.

The ordinances provide for guard rails on areaways adjoining streets; there could be no two opinions about the matter, and therefore a question properly to be determined by the court, if the areaway was along the line of the sidewalk on a dedicated public street. But the ordinances also provide for guard rails on areaways along public spaces or any passageway or court.

The defendant in error, having built the sidewalk and created the situation which has the appearance of a street, and having, so far as the record now discloses, permitted it to be in all respects used as a street or passageway, we think that it was a question for the jury, under proper instructions by the court, to determine whether or not, under all the circumstances, this

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areaway was so situated as to be within the purview of said ordinance, and therefore was required to be provided with a guard or rail. *Sovignac v. Garrison*, 18 Howard, 136.

But defendant in error contends that, conceding that the ordinances required a railing under the circumstances here disclosed, still that requirement was not for the benefit of plaintiff in error, who had no business upon said property and was at best a mere licensee; that its duty to such is fixed by the common law, and that the effect of the ordinances is not to extend its duties to those to whom it theretofore owed no duty, but rather to define and fix the extent of the duty to those to whom it already owed a duty.

It is conceded by the plaintiff in error that but for these ordinances the plaintiff in error was, under the laws of Ohio, a mere licensee, and could not, at common law, recover damages for her injury from the defendant in error; but she claims that said ordinances required a guard rail along the areaway in question and that such requirement was for the benefit of the public generally, herself included, and that the common law rule of duty owed by property owners to trespassers and licensees has been modified by said ordinances.

The question thus presented is not a new one; it has been before many courts and there is an apparent diversity of opinion in reference to the matter.

We may eliminate those cases where the ordinance or statute imposed duties to or for the benefit of the municipality or the public, as an entity, for in such cases individuals, as such, have no right of action growing out of the violation of the ordinance or statute.

There is also a class of cases where duties are imposed for the benefit of a particular class, and in such cases only the persons coming within the particular class can complain of the violation of the ordinance or statute.

There is, however, a third class of cases in which the ordinance or statute imposes duties for the benefit of the public considered as a composite of individuals. It is said in one of the cases, speaking of this class of ordinances, that:

“These are police regulations for the protection of the public relative to matters with which the public contact is commonly through individuals, and as to which the individuals are entitled to assume that the law has been observed.”

The line of demarcation between the second and third classes above mentioned is not clearly defined in the cases, and it is not our purpose to try to lay down any general rule on the subject.

It is sufficient to observe that the cases where the ordinance or statute has been held to be for the benefit of a particular class are cases where the thing or object which is the subject of the law and required to be guarded is usually or almost necessarily removed from contact with the general public, or cases where, because of the peculiar wording of the law, it is apparent that it is for the benefit of a particular class.

. None of them, so far as we have been able to ascertain, have been cases where the thing to be guarded is close to and open to a public street, and although upon private property is at a place where the public generally have a right to go or by long continued custom have been in the habit of going.

In the case at bar the evidence tends to prove that the areaway in question was close to a public street and was alongside of the part of defendant in error's property which it had improved, so as to give it the appearance of a street, and which it had permitted to be used as a street by the general public for many years.

If, under the court's instruction as to the objects and purposes and meaning of the ordinances, the jury should find facts which brings this areaway within the terms of the ordinances, then under the situation which the evidence as it now is tends to prove, we hold that the requirement of a guard or railing on said areaway is not for the benefit of a particular class but for the benefit of the public, considered as a composite of individuals, and that a right of action arises in one of the public when he has sustained some special injury by reason of a non-compliance with the ordinances, irrespective of the fact that at common law he would be considered a mere licensee. *Conway v. Monidah Trust Co.*, 132 Pac. Rep., 26, and cases therein cited.

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Although not directly in point, this conclusion is aided by a consideration of the cases on the question of what constitutes an invitation by an owner to the public to come upon his premises. While it is definitely settled in Ohio that a mere permission by the owner of the use of his premises will not be considered as an inducement, or an allurement, or an enticement so as to amount to an invitation, still it has not been determined that where an owner improves his property so that it may be used by the public as a street, and permits the public to so use it as a street, that under such circumstances there may not be an implied invitation on the part of the owner to so use his property; at least it has not been determined that under such circumstances the trial court is justified in finding as a matter of law that such person is a trespasser to whom the owner owes no duty.

It must be remembered that we have before us a case where the various questions which we have been discussing were determined by the court as matters of law, and that the rule as stated by an eminent authority, is that:

“Where the facts are undisputed, and where, although undisputed, the inference to be deduced from them is clear and certain, it is a question of law for the court. Although the facts are not controverted, yet if different minds may reasonably draw different conclusions, the question is one for the jury as one of fact, and not for the court as one of law.”

It is further claimed by the defendant in error that even if it was negligence on its part not to have a railing on said areaway, still such negligence is not proven by the record to have been the proximate cause of plaintiff's injury.

Whether or not a non-compliance with the statute was the proximate cause of plaintiff's injury is not, as we view it, under the evidence now in the record, a question for the court to determine. Proximate cause is usually a mixed question of law and fact. It is not necessary to prove the cause to a demonstration; if the evidence establishes circumstances from which it may fairly be inferred that there is reasonable probability that the neglect complained of caused the injury, then it is clearly a

question for the jury. *Haynes v. Mich. Central Ry.*, 111 U. S., 228, p. 238.

We hold that the evidence offered was competent and that the case should have been submitted to a jury, and that it was error for the court to direct a verdict for the defendant in error.

Judgment reversed and cause remanded.

GRANT and DUNLAP, JJ., concur.

REDUCTION OF VERDICT WHEN AN ACT OF GRACE.

Court of Appeals for Cuyahoga County.

PAUL PECSOK AND MARY PECSOK V. JOHN ERTLER.

Decided, February 7, 1919.

Verdict—Error may not be Based by Defendants on a Reduction in the Amount of the Verdict, When—Exemplary Damages may Probably be Predicated on an Assault—Notwithstanding Malice is not Averred in the Petition—Bad Motive in Fixing Amount of Verdict.

Where a verdict for injuries sustained was reduced by the trial judge *sua sponte* and not because deemed by him to be excessive, it is an act of grace or judicial clemency on his part and complaint does not lie in the mouths of the defendants because the benefits of the reduction were not apportioned among them.

David & Heald for plaintiffs in error.

Strong, Desberg, Bernstein & Mooney, contra.

Error to the Municipal Court of Cleveland.

GRANT, J.

In the court below the plaintiff there—defendant in this court—declared against both defendants, the present plaintiffs in error, for injuries resulting, as he said from an assault on him, committed by them, laying his damages in that respect at \$700.

In a second cause of action he laid claim to \$300 from the defendant Paul Pecsok only, for causing the plaintiff's arrest, maliciously and falsely.

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The case was tried to a jury. There was a verdict against both plaintiffs in error for \$400 on the first cause of action and for \$150 against Paul Pecsok alone, on the second cause of action.

The trial judge *sua sponte*, reduced the amount of the verdict by \$150, generally, and entered judgment for the remainder of \$400, first overruling a motion for a new trial.

The errors assigned in the briefs are, or appear to be first, that the court below reduced the amount of the verdict, but did not apportion the reduction among the two defendants, or designate which one was to be the beneficiary of it.

We do not think the complaint is available to those who make it. The question of amount being for the jury, unless the amount found by them is to be disturbed because unconscionably large, or unwarranted by the evidence, a court of review would have to uphold the verdict in its entire amount, as at first returned. So that, in that view—which is the view we take of this case,—the reduction ordered by the court below can be regarded only as an act of grace or judicial clemency on his part, of which it does not lie in the mouth of the beneficiaries to complain. A litigant may not be heard to object to being done good to. His luck is not the less for having to share it with another in any proportion at all, provided some of it falls to him, if the amount at first found is not to be deemed excessive.

As the questions tried were wholly of fact and the testimony was in dispute,—it was for the jury alone to resolve it and assess the consequences, within legally allowable bounds. We think those bounds were not transgressed in the present case.

It is said in the brief that as punitive damages could not be awarded in the first cause of action—no malice being averred in that,—the reduction made by the court not being distributed among the two defendants, may have operated as a hardship on the woman who was not in fault under the second cause of action, that being the only one in which exemplary damages could have been allowed.

If this argument is comprehended, it has already been answered, the cutting down being an uncovenanted mercy, a sheer piece of good luck in any event, the objector having no ground of complaint if no part of it came to him.

Besides, it is more than doubtful, we think, whether exemplary damages may not be predicated of an assault, without in terms pleading the maliciousness of it. Ruling Case Law, Volume 2, p. 582, states the principle underlying the rule thus:

"In most cases of assault and battery the actual physical injury suffered by the plaintiff is insignificant as compared to the mental suffering caused by the wantonness and malice of the defendant and the indignity, vexation and disgrace to which the plaintiff was subjected by the defendant's acts." *Chicago and N. W. Ry. Co. v. Williams*, 55 Ill., 185.

Second, it is complained that the judgment is so excessive in amount as to fall under the condemnation which the law annexes to deliverances made from the bad and corrupt motive of passion or prejudice. And our holding in *Cleveland Worsted Mills v. Coates, Gdn.*, is appealed to in support of the argument.

We distinctly declined to weigh the evidence in that case to see whether the bad motive had operated or not. We held that to so find, the verdict by the single force of its amount must be so large, in comparison with the visible case, as to shock the conscience of a reviewing court into the conclusive inference that the corrupt motive had intervened and coerced the verdict.

Such is not this case, as we view it.

We find no error of substance in the judgment under review.

It is therefore, affirmed.

DUNLAP, J., and WASHBURN, J., concur.

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**VALIDITY OF AN ASSIGNMENT OF THE PROCEEDS
OF A CONTRACT.**

Court of Appeals for Franklin County.

STATE OF OHIO, EX REL CLINTON COWEN, STATE HIGHWAY COM-
MISSIONER, v. ROBINS & McDANIEL ET AL.

Decided, December 10, 1918.

*Workmen's Compensation—Priority of Lien of Judgment Obtained by
Injured Employee Against Contractors—As Against Claim for
Material Furnished under Pledge of Proceeds of the Contract—
Legality of Assignment of Proceeds.*

1. An agreement whereby a firm of contractors pledged to a company from which they were receiving material, for the purpose of guaranteeing payment for said material, the sum of \$2,000 then due under the contract and any further sums to become due on account of material so received, does not constitute a valid assignment of the full amount called for under the contract, where the full amount was largely in excess of the sum then due, and the amount which would become due for the material in the future was uncertain, as was also the amount which would become due to the contractors because of the fact that they might not complete the work, and there was an express provision that the balance over was to be paid to the contractors, and the checks to be sent to the pledgee were to be made out to the contractors and endorsed over by them.
2. No valid assignment having been made of the whole amount to become due under the contract, it follows that the lien of a judgment of an injured employee which by provision of the workmen's compensation act covers all the assets of his employers, is prior to that of the company which furnished the material.
3. Whether a party who secures the assignment of the proceeds of an improvement contract takes it subject to the provisions of the workmen's compensation act—Quære?

*W. L. Connors, Frank Davis, Jr., and James I. Boulger, for
Albertus B. Swank.*

*Carey & Hall and C. H. Duncan, for The National Quarries
Co.*

KUNKLE, J.

In brief it appears from the record that in July, 1916, Albertus B. Swank was in the employ of Robins & McDaniel, a partnership, and received serious personal injuries in the course of his employment; that Robins & McDaniel were employers of more than five workmen, and failed to comply with the provisions of the workmen's compensation act.

An application was made by said Swank to the Industrial Commission for an award under Section 27 of the workmen's compensation act, which provides that when the employer is not directly or indirectly insured in the state fund his employee may elect to proceed before the commission for the allowance of compensation.

In October, 1916, the Industrial Commission made an allowance in favor of said Swank in the sum of \$444 as part compensation and continued the cause for further investigation.

On April 3, 1917, the Industrial Commission made a final award to said Swank in the sum of \$12,829.53.

Robins & McDaniel failed to comply with such award, and suit was brought in the court of common pleas of Clark county where the defendants reside, and in October, 1917, judgment was rendered in such court against Robins & McDaniel and in favor of said Swank for the amount of said award, which judgment is still unpaid.

On April 2, 1915, Robins & McDaniel entered into a contract with the state for the improvement of the Springfield and Washington C. H. road.

On February 9, 1916, Robins & McDaniel entered into a contract with the National Quarries Company, by which they pledged some \$2,000, due them on their contract with the state, and also pledged any further sums to become due said Robins & McDaniel on said contract for the purpose of protecting and guaranteeing payment to the National Quarries Company for an existing indebtedness of \$4,733.13 for crushed stone used on said improvement.

The contract further provides that all subsequent checks due Robins & McDaniel from the state highway department upon

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said contract shall be sent to the National Quarries Company at Carey, Ohio; that said Robins & McDaniel were to enclose all such checks to said quarries company and the quarries company was to retain such portion of the amount of such checks as would pay for any stone furnished in the future on said improvement, and the excess was to be paid to the said Robins & McDaniel.

It was further provided that upon the final completion of the work the check or checks issued for the retained percentage should be sent to the quarries company and should be endorsed by the said Robins & McDaniel, and applied on the indebtedness of the quarries company, the balance, if any, to be paid to Robins & McDaniel.

It was also agreed that the quarries company should be authorized to indorse the name of Robins & McDaniel upon any and all checks sent to the quarries company under the provisions of said contract.

On the same day, viz., February 9, 1916, Robins & McDaniel wrote Clinton Cowen, the state highway commissioner, a letter, of which the following is a copy:

“Springfield, Ohio, Feb. 9, 1916.

Clinton Cowen, State Highway
Commissioner, Columbus, Ohio.

Dear Sir:

On and after this date please send all our checks for work done on the Springfield-Washington C. H. Road to the National Quarries Company of Carey, Ohio, and oblige.

Yours very truly,

ROBINS & MCDANIEL.

JAMES C. ROBINS,

FRANK E. MCDANIEL.”

On February 28th a letter, of which the following is a copy was sent to Robins & McDaniel by the state highway commissioner, viz:

“February 28, 1916.

Robins & McDaniel,
Springfield, Ohio.

Gentlemen:

Replying to your favor of recent date, will say that in the future all estimates on the Springfield-Washington C. H. road

will be mailed to the National Quarries Company at Carey, Ohio, as requested. The warrants will be made payable to you, but sent to them.

Yours very truly,

CLINTON COWEN,
State Highway Commissioner."

Subsequent to this, in answer to an inquiry of the National Quarries Company as to when further payment would be made, the state highway commissioner referred to the contract aforesaid as "your assignment."

The original contract price for the construction of said highway by said Robins & McDaniel was \$23,966. Prior to September 12, 1916, there was paid to said Robins & McDaniel on said contract the sum of \$11,133.51, all of which was paid prior to February 9, 1916, leaving unpaid on the entire contract price the sum of \$12,832.49.

On September 12, 1916, the state highway commissioner removed said Robins & McDaniel from the work of constructing said highway, and completed the same by force account, as provided in Section 1209, General Code, and expended in completing said work a total sum of \$7,130.60.

After the payment of all bills there remained in the hands of the state the sum of \$5,701.89.

The National Quarries Company claim this sum under its alleged assignment, and Albertus B. Swank claims the fund under Section 30 of the workmen's compensation act, which provides that—

"All judgments obtained in any action prosecuted by the board or by the state under the authority of this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law on judgments rendered for claims for taxes."

The highway commissioner has paid this money into court for the purpose of having the same turned over to the party entitled thereto.

The common pleas court found in favor of the National Quar-

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ries Company and ordered the said money, less the court costs, turned over to said the National Quarries Company.

From such judgment Albertus B. Swank appeals to this court.

Under Section 30 of the workmen's compensation act said Albertus B. Swank has a prior lien upon all the assets of his employer.

It is contended, however, by the National Quarries Company that the agreement of February 9, 1916, together with the letter of the state highway commissioner dated February 28, 1916, constitutes a valid assignment of the amount due Robins & McDaniel on said contract, and that said sum formed no part of the assets of Robins & McDaniel at the time the accident occurred to said Swank, viz: July 8, 1916, or at the time the award in his favor was made by the Industrial Commission and the judgment was rendered on such award by the court of common pleas of Clark county, Ohio.

Albertus B. Swank, on the contrary, claims that there was no valid assignment of said fund, and that his claim to priority under the statute is superior to the claim of the National Quarries Company.

This case presents a very interesting question and counsel have greatly assisted the court by their helpful briefs. Many cases of a somewhat similar nature have been cited by counsel on both sides.

While we have carefully considered such cases, yet we will not attempt to review them in detail.

Upon a consideration of the authorities, when applied to the facts in the case at bar, we are inclined to the opinion that the National Quarries Company did not have a valid and legal assignment of the entire amount due Robins & McDaniel upon said contract, and that there was no such acceptance on the part of the state highway commissioner as would give the National Quarries Company the absolute right to the fund in controversy.

Among other things, it appears that out of the alleged assignment there was unpaid on the contract price the sum of \$12,832.49, and the amount actually due the National Quarries Company from Robins & McDaniel was \$4,733.13.

The amount which might finally become due Robins & McDaniel upon said contract was uncertain because of the possibility that the said work might not be completed by them; and the amount of the future indebtedness to the National Quarries Company for stone to be furnished was also indefinite.

The agreement between Robins & McDaniel and the National Quarries Company shows that Robins & McDaniel did not intend to transfer to the National Quarries Company more than was sufficient to secure them for such material as they might furnish, and it was expressly provided that the balance, if any, was to be paid to Robins & McDaniel.

In addition, the contract does not provide that the future estimates or checks should be made payable to the National Quarries Company, but, on the contrary, provides that the future checks should be made payable to Robins & McDaniel, and that said Robins & McDaniel should indorse the same from time to time, either personally or through the agency of the National Quarries Company.

This feature is also evidenced by the letter of the state highway commissioner to the effect that warrants would be made payable to Robins & McDaniel, but would be mailed to the National Quarries Company.

We think these documents, in connection with the circumstances and the nature of the contract, show that it was not the intention of the parties to make an unconditional assignment of the entire fund nor of any definite and specified portion thereof.

We think the weight of authority is to the effect that an agreement of this kind will not constitute a valid assignment without an unqualified acceptance thereof, and it appears in the case at bar that no such unqualified acceptance was given by the state highway commissioner.

The acceptance of the state highway commissioner expressly recognized the legal right of Robins & McDaniel to the warrants in question. The mere delivery to the National Quarries Company of such warrants, which are made payable to Robins & McDaniel, would not extinguish the title of Robins & McDaniel therein, nor would it confer upon the National Quarries Com-

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pany the legal title thereto. There was still required the additional act of securing the endorsement of Robins & McDaniel, "either personally or through an agent," before the title to such warrants could be legally transferred to the National Quarries Company.

It is contended by counsel for the National Quarries Company that the provision in the agreement by which the National Quarries Company was authorized to endorse the warrants from time to time is equivalent to a full extinguishment of the legal title of Robins & McDaniel in such warrants.

Taking into consideration the entire contract and the nature of the transaction, we do not think such provision in the contract would amount to a total extinction of the legal title of Robins & McDaniel in such warrants. In any event such provision was not binding upon the state highway commissioner and formed no part of his alleged acceptance.

It is claimed by counsel for Albertus B. Swank in a supplemental memorandum that the principle involved in the case of *Brown, Administrator, v. Winterbottom* (98 O. S. p. —) sustains the doctrine that a party securing an assignment of the proceeds of an improvement contract similar to the one in question, takes the same subject to the provisions of the workmen's compensation act, and the possible lien therein provided in favor of injured employees.

This suggestion presents an interesting question, but in view of our conclusion as to the validity of the alleged assignment we do not find it necessary to express an opinion thereon.

The said fund, subject to the payment of the court costs, will be awarded to the said Albertus B. Swank.

ALIREAD and FERNEDING, JJ., concur.

**RIGHT OF LAND OWNER TO CROSSING OVER RAILWAY
UPON WHICH HE ABUTS.**

Court of Appeals for Cuyahoga County.

**THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v.
MARY S. BRADFORD ET AL.**

Decided, February 7, 1919.

*Railways—Not Compelled to Construct Crossings for Abutting Owners,
When—Farm and Not Industrial Crossings Contemplated by the
Statute—Presumption that Compensation was made Originally
When the Tract was divided into Two Parcels.*

1. The provisions of Section 8858, General Code, for the construction of private crossings for abutting owners of tracts of fifteen acres or more through which a railway passes, has reference to farm crossings where the two parcels so divided are used in a reciprocal or interdependent way, and not to tracts of land used for industrial purposes.
2. Such a crossing can not be required as a way of necessity, where the tract on either side is accessible to a highway, not as convenient perhaps as the short-cut desired, but affording ample and much safer ingress and egress.
3. A presumption arises in such a case that the inconvenience arising from the division of a tract into two parcels by the building of the railway was considered and discounted when the right-of-way was acquired.

*Cook, McGowan & Foote, for plaintiff in error.
Edward Bushnell, Esq., contra.*

GRANT, J.

Appeal from the court of common pleas.

Owing to calls upon our time, over which just now we have little control, and which counsel will appreciate, as well as because they are themselves so thoroughly conversant with the facts, we shall do little more here than state our position in terms of conclusion.

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The case is in equity, to restrain the location of a crossing over the right-of-way and tracks of the plaintiff company in the city of Cleveland.

The defendants claim to be entitled to the crossing on two grounds:

First, because the statute gives them the right to it;

Second, because it is a necessity to them.

The statute thus referred to and which is claimed to be the enabling act for the location of the crossing in this case, has in its history passed through various forms and changes as to its verbiage, but probably not much affecting its purpose or application to the circumstances with which we have to do here. As first passed in 1859, it read as follows:

“(§. & C. 331). Every railroad is required to make and maintain a sufficient number of suitable crossings for the accommodation of the public and of persons living near the line of such railroad. * * Any person or persons desiring a private crossing or crossings and cattle guards, as contemplated by this act, shall be responsible for one-half the expense of constructing and maintaining same.”

The amendment of 1871 is not material here.

In 1874 the act was changed to the following form of preamble recitation:

“Any farmer or person owning fifteen or more acres of land in one body, through which such railroad may or does pass, and which is so situated that the owner thereof can not use one of said crossings in a public street, road, lane or highway, over said railroad in passing from his land on one side of said railroad to that on the other without great inconvenience,”

and continuing with provisions and requirements calculated to make effectual its purpose for the benefit of the farmer or land proprietor.

When the Ohio laws were revised in 1880 the word “farmer,” as the alternative of the owner of the acreage, was omitted, probably in the interest of brevity and word-compression.

In its present form, the statute is in the following language:

"G. C., Sec. 8858. When a person owns fifteen or more acres of land in one body, through which a railroad passes, and which is so situated that he can not use a crossing in a public street, lane, road or other highway, in going from his land on one side of the railroad to that on the other side without great inconvenience, at his request, and within four months thereafter, the company or person operating it, at the expense of such company or person shall construct a good and sufficient private crossing across such railroad and the lands occupied by the company, between the two pieces of land to enable such landowner to pass with a loaded team, and over which he may go at all times when such railroad is not being used at the crossing, or so near to it as to render passing thereat dangerous."

Upon a full consideration of the language of this enactment, in the successive stages of its development, the purposes we think it was intended to subserve, and the public policy underlying it, we have reached a substantial agreement with the plaintiff's contention that the legislative end in view was a farm crossing. The amount of land designated as the least that could be served by the crossing would, it appears to us, be quite irrational if an industrial use was contemplated by it. Service tributary to a tract as small as fifteen acres would take care of the gardener or trucker, while the larger farmer of course would share in it, and the well-known policy of the state to encourage agriculture would be promoted by the legislation. Judge Shauck's use of the term in the Gratz case, 76 O. S., 230, as well as the syllabus, would have been more guarded had not the court regarded the crossing as a "farm crossing" in the sense we are putting upon it.

Our opinion also is that the statute intended to deal with a reciprocal or interdependent use of the land on both sides of the plaintiff's right-of-way.

We fail to find evidence in the case that, if the crossing were allowed, the two parcels could normally or providently be used together for agricultural purposes.

Their appropriate use, for any purpose, so far as appears, is a separate use; for farm purposes, practically speaking and having regard to constant liability during farming hours to the

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paramount use of the railway company, the advantage of the crossing would be negligible.

Starting from the premise that the crossing contemplated by the statute is a farm crossing, we reach without difficulty the conclusion that the crossing sought by the defendants is inadmissible under that law.

Coming to the remaining contention that the crossing ought to be allowed as a way of necessity, the difficulties accompanying that view are, as we think, so considerable as to be insuperable.

The tract on either side of the company's right-of-way is accessible from another highway.

There is an outlet to each; not as short, not as direct, it is true, as the cut proposed across the tracks, but still such as to afford means of approach and egress, inconveniently, perhaps, but far safer than by the direct route, which appears to us to be in practical disobedience to the wholesome public policy in Ohio against grade crossings in cities; it looks to us as if it would be not far from a nuisance, if permitted, taking into account the dominant use by the railroad in operating its trains at that point.

It is not certain that the inconvenience said to result to the defendant's property from the tracks being interposed between the two parts of it, was not considered and discounted when the parties sold and got their pay for the right-of-way which served to split the theretofore use of the whole. If the right-of-way had been acquired by appropriation instead of purchase, the jury by a separate verdict must have returned the entire lessened value of both tracts involved here, by reason of the right-of-way being interposed and cutting them off from the access which the defendants are seeking to restore by the crossing claimed; and the company would have been required to pay that lessened valuation. Perhaps it did pay for it.

The lessened value could have been estimated upon the basis of any reasonable use to which the severed parcels could in the reasonable future have been put, if instead of being cut in twain they had been left as one parcel.

We are not, however, founding our conclusion on this consid-

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eration. What we do say at this point is that the proof fails to justify a way of necessity, under the circumstances of this case.

We find the equities with the plaintiff. A perpetual injunction is awarded. Decree accordingly.

A request has been made for a finding of facts. As claimed by the requesters and extracted from what we have now said, a draft of such finding may be prepared by counsel asking for it, and submitted to the other side, but to the court in any event, for approval if correct.

DUNLAP and WASHBURN, JJ., concur.

RIGHTS OF OWNER ABUTTING ON UNFENCED RAILWAY.

Court of Appeals for Trumbull County.

NICHOLAS CHURCH V. THE BALTIMORE & OHIO RAILROAD
COMPANY.

Decided, September 27, 1918.

Railroad Company—Must Maintain Fences Along Right of Way—Liability for Damages Resulting from Failure to Maintain—Limited to Injury or Loss on Right of Way.

Where a railroad company neglects or refuses to construct and maintain fences along its right of way, under Section 8913 General Code, its liability to respond in damages is limited to such loss or injuries as occur upon its right of way, and not elsewhere, and an adjoining land owner can not recover the cost of herding his cattle or other animals upon abutting pasture lands where such company has neglected or refused to fence its right of way along the same, nor can he recover for loss of profits from dairy cows by reason of their not being permitted to remain in such abutting pasture lands during the night season.

William L. Countryman, for plaintiff in Error.

Hine, Kennedy, Manchester & Conroy and Fillius & Fillius,
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FARR, J.

Church, plaintiff in error, was plaintiff below, and brought suit in the Court of Common Pleas of Trumbull County, to recover against the defendant company on two causes of action. The first, for the alleged failure to construct and maintain in good repair fences on either side of its right-of-way through certain premises, occupied by him for dairy purposes in said county, and on which two tracts of pasture lands abutted, containing sixty and eighty acres respectively; and that by reason of such failure, he was required to have his thirty-one head of dairy cows herded or "watched" on said eighty-acre tract of said pasture lands and away from defendant's tracks for one and one-half seasons at an expenditure of five hundred and forty dollars, for which he asks judgment.

The second cause of action is for failure to fence said right-of-way, as required by law, and where it is alleged that said sixty-acre tract of pasture lands abuts the same, and which Church claims he used as a close for his dairy cattle during the night season, and by reason of such failure he was required to stable said cattle at night, which he claims resulted in a lessened quantity of milk given by said cows, to his damage in the sum of one thousand one hundred and seventy-seven dollars, for which judgment is claimed.

A demurrer was filed to the petition, which demurrer was sustained, and the plaintiff, not desiring to plead further, error is prosecuted in this court.

The issue raised here, therefore, is whether the failure of the railway company to maintain along its right-of-way, fences sufficient to turn stock, renders it liable upon the causes of action set out in the petition. A railway company was not required at common law to fence its right-of-way; such obligation is therefore statutory and in Ohio is created by Section 8913, General Code, which provides, among other things, that a person or company having control or management of a railroad, shall construct and maintain in good repair on each side of such road, along the line of its right-of-way, a fence sufficient to turn stock. Said statute is in the nature of a police regulation and

was enacted primarily in the interest and for the welfare of the public. As the number of railroads grew in this state, travel over them increased and likewise the dangers imminent to collisions of passenger trains with live stock; therefore, the Legislature, largely from considerations of public policy, passed the initial act March 25th, A. D. 1859 (56 O. L., 62), entitled "An act, providing for enclosing railroads by fences and cattle guards," and in the first section of which the legislative intent is disclosed as follows: "To prevent cattle and other animals from endangering themselves and the lives of passengers by getting upon such railroad." The foregoing fully discloses the primary purpose of said statute, and further comment is therefore unnecessary.

It is provided by Section 8916, General Code, that if such company or person neglects or refuses to construct a fence, as required in said Section 8913, General Code, that the owner of such lands may construct the same, render an itemized account therefor and, if payment is not made, it may be enforced by suit after thirty days. Therefore, if a railroad company neglects or refuses to fence its tracks, as required, the abutting land owner has the alternative right to do it himself and require compensation from such company.

In the case at bar Church had a right to use his abutting pasture lands for grazing purposes, regardless of the fact that the company neglected or refused to construct or suitably repair and maintain the fences along its right-of-way. He might very properly have permitted his cattle to be upon said lands without herding them away from the railroad, and if they went upon the tracks and damages resulted, he could not be charged with contributory negligence; *Railway Company v. Smith*, 38 Ohio St., 410; *Railway Company v. Scudder*, 40 Ohio St., 173, and the company would be liable for any loss so sustained. It was not the legislative intent that a land owner abandon the use of his fields because a railroad company neglected to perform a duty enjoined by statute. If, however, a land owner should prefer not to exercise such right, he may protect his stock from injury by constructing the necessary fences himself

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and recover compensation therefor. He must, however, if the company neglects or refuses to fence, as in the statute provided, elect to use his abutting lands uninclosed as to such right-of-way, placing the responsibility for any injury upon the company or do the fencing himself and recover compensation.

He can not, however, refuse to do either and still require the company to keep his cattle and other animals safe. As above observed, the primary purpose of the statute is to prevent injuries to cattle and other animals upon railroad tracks, thereby "endangering the lives of passengers" on railway trains; it therefore relates solely to injuries upon such tracks.

In the instant case Church sustained no loss from injuries to his cattle on the tracks of defendant company; he might never have sustained loss by permitting his cattle to graze unherded on his abutting pasture lands, and to hold that he would have sustained loss had his cattle not been herded, is to "guess" that he might or would have been injured. The duty imposed upon a railroad company of excluding stock from its tracks or right-of-way is *only* for the purpose of preventing injury or damages thereon and not elsewhere, and to hold otherwise would be to impose a greater burden on a railroad company than was contemplated by the statute or than could be justified in reason.

It is urged that said Section 8913, G. C., is mandatory. If indeed it be so, the penalty for the disobedience of its mandate is that an offending railway company respond in damages for any loss sustained from injuries resulting by reason thereof. Where? On abutting lands, in the surrounding fields? Scarcely so, but on its right-of-way or tracks, and when its failure to fence was the proximate cause of such loss.

The issue under discussion here is practically determined in *Railway Company v. Phillips*, 81 Ohio St., 456, as follows:

"The liability of a railroad company, under Section 3324, Revised Statutes, to respond in damages for injuries to stock, in consequence of its neglect to construct and maintain a sufficient fence on each side of its road, is limited to loss or injuries occurring upon its own right-of-way."

The foregoing is somewhat different from the instant case as to facts, but the principle announced is fully in point. Section 3324, R. S., is now Section 8913, G. C., and holding practically to the same effect as the above case is *Millhouse v. Railway Company*, 7 C. C., 466, 467, both of which are well in point with the case at bar.

Another objection that might well have been successfully urged to both causes of action is that the claims made are so remote and uncertain in character, as to not warrant a recovery, and, while the objection applies to both, it is especially true as to the second cause of action in which damages are claimed for loss in the quantity of milk given by the dairy cows. The cases of *Gaar, Scott & Company v. Snook*, 1 C. C., 259, and *Rhodes v. Baird*, 16 O. S., 573, are fully determinative of this issue. In view of all the foregoing the conclusion is that the judgment of the court below is right, and it is therefore affirmed.

POLLOCK and METCALFE, JJ., concur.

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DEATH OF A LEGATEE BEFORE TAKING.

Court of Appeals for Knox County.

W. O. PHILLIPS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT
OF THOMAS F. COLE, DECEASED, v. S. P. CHASE COLE ET AL.

Decided, November 21, 1918.

*Wills—Vesting of Legacy at Death of Testator—Not Affected by Death
of Legatee Before Distribution, When.*

Where the vesting of a legacy is not postponed by the will, the death of the legatee before payment does not cast the legacy back into the estate but it becomes payable to the personal representative of the deceased legatee in the manner provided in the will.

Ewalt & Blair, for Maud Cole Ball.

Vorys, Seymour, Sater & Pease, for Anna B. Cole, Executrix.

HOUCK, J.

Appeal.

This is a suit brought for the purpose of having the last will and testament of Thomas F. Cole, deceased, construed. The following are the conceded facts:

That on the 27th day of March, 1917, Thomas F. Cole departed this life, leaving a last will and testament, and W. O. Phillips was named as executor of said will, and duly qualified in the premises; that at the time of the death of Thomas F. Cole, his son, M. Francis Cole, named as one of the legatees in Item Four of said will, was in full life, and afterwards, to-wit, on the 1st day of May, 1917, departed this life, leaving the defendant, Anna B. Cole, his widow, and the defendant, Maud Cole Ball, his daughter by a former marriage, his only heirs at law; that M. Francis Cole died testate, and that Anna B. Cole is the duly appointed, qualified and acting executrix of his last will and testament; that Thomas F. Cole left surviving him Charity Cole, his widow, and S. P. Chase Cole, W. U. Cole, M. Francis

Cole, R. L. Cole, Mary Shellenbarger and Alice King, his children and legatees.

The will of Thomas Cole (in part) is:

"Item Third: I will and direct my executor hereinafter named to convert all of my property, both real and personal, into money as soon after my death as practicable, giving him authority to sell either at public or private sale, with or without appraisement, for the best price obtainable.

"I direct my executor hereinafter named, after the payment of expenses and indebtedness above named to invest the sum of ten thousand dollars (\$10,000) within a year after my death in some safe security or securities of undoubted value, and the proceeds thereof my said executor to pay semi-annually, or half yearly, the income or interest arising therefrom to my wife, Charity Cole, this to be in full of her interest in my estate, except one year's support, both real and personal, the income therefrom will be sufficient to maintain and support her.

"Item Fourth: The rest and residue of my estate after the payment of debts above named and after setting apart and investing the said sum of ten thousand dollars (\$10,000) to be divided equally among my children as follows, share and share alike, M. Francis Cole, S. P. Chase Cole, W. Utteridge Cole, Robert L. Cole, Mary Shellenbarger, Alice King. Should any one or more of my children above named die leaving a child or children, then said child or children shall take the parents' share. If they should die leaving no child or children, or their legal representatives, then such share or interest I direct to be divided equally among the survivor or survivors.

"Item Fifth: At the death of my said widow, after the payment of the expenses attending her last sickness and burial, I direct the sum above named which is to be set apart, to-wit: \$10,000 for the benefit of my said widow, to be divided equally among my children aforesaid; should any of them not be living at the time of my said wife's death leaving child or children, then such child or children shall take the parents' share; and in the event of any one or more of my said children heretofore named should die without leaving a child or children, or their legal representatives, then the survivor or survivors of them are to receive said \$10,000 in equal portions."

Question: Under these facts and the law applicable to wills, what are the respective rights of Anna B. Cole, as executrix of

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the will of M. Francis Cole, deceased; and his daughter, Maud Cole Ball, in and to the legacy of M. Francis Cole, as contained in Item Four of the will of the late Thomas F. Cole?

The facts disclose that M. Francis Cole survived his father only thirty-five days. This fact raises two questions: (1) Did the legacy of M. Francis Cole vest in him upon the death of his father, and upon his death go to his personal representatives? (2) By reason of the death of M. Francis Cole before the payment of said legacy to him, and before the estate of Thomas F. Cole was distributed, did said legacy go to and vest in the daughter of the legatee, Maud Cole Ball?

Certain fixed rules have been laid down by courts to be used in the construction of wills, but they are not to be applied where necessity does not require it. If the language is plain, and the intention of the testator can be ascertained from same, then the use of fast and court-made rules has no place in such cases.

Each will stands alone, and the purpose and intention of the testator must be found and ascertained from the language used in the instrument. It is the exception and not the rule where we find two wills presenting exactly the same question, and it follows that unless an adjudicated case cited by counsel is directly in point, it has little weight with an interpreting court. In our examination of authorities cited by counsel, as well as an exhaustive research on our part, we have been unable to find a case directly in point, or decisive of the question made here.

We hold that the vital point in this case is as to the legal effect of the following language used in Item Four of the will of Thomas F. Cole, to-wit: "Should any one or more of my children above named die leaving a child or children, then said child or children shall take the parent's share."

The testator was bound to know the law, and that his will would speak from the date of his death, and that a legacy, where not specifically postponed by language clearly indicating such intention and purpose, vests immediately, on the death of the testator, in the legatee. The language in question does not designate any stated time for the payment of the legacies, but as to this it is silent.

The testator was satisfied with the language employed, which in no wise postponed the time of vesting of the legacies beyond his death, and by his silence and failure so to do, the law intervenes and fixes the time to be the death of the testator. If he had intended the legacy now under consideration not to vest in his son, M. Francis Cole, upon his decease before that of his son, or desired its payment postponed to a certain time, or until the happening of some future event, he could have done so by making proper provisions for it by the use of such language as would definitely indicate such intention on his part.

A careful study of Item Four of said will discloses that the only event to which the contingency of death can refer is the death of Thomas F. Cole, which is the period or time fixed when the legatees would come into the enjoyment of their legacies, and at that time their rights and interests in and to their respective legacies became vested absolutely, and therefore were no longer under the dominion of said will.

Each legatee had a perfect right to dispose of his respective interest, and could pass a perfect title to the purchaser, or could convey same by will, as appears to have been done in the case at bar.

We find no condition attached to the gift, and no postponement as to the time of its taking effect, and therefore we hold that upon the death of Thomas F. Cole the bequest made in his will to M. Francis Cole became a fixed and absolute estate in him, and that it should be paid to Anna B. Cole, as executrix of the last will and testament of the said M. Francis Cole, deceased.

Judgment accordingly.

POWELL and SHIELDS, JJ., concur.

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**LIABILITY ON A CHECK DRAWN AGAINST AN
INADEQUATE DEPOSIT.**

Court of Appeals for Clark County.

(Judge Richards of the Sixth District sitting by designation in place
of Judge Kunkle of the Second District.)**WILLIAM PAIGE V. THE SPRINGFIELD NATIONAL BANK.**

Decided, February 19, 1919.

Banks and Banking—Check Accepted by Bank Against an Insufficient Deposit—In Dispute whether Acceptance was Conditional on being Made Good—Other Small Checks Paid out of the Deposit—Duty of Bank if Acting as Collecting Agent—How Deposits shall be Used may be Designated by Depositor.

1. As a mere drawee, a bank on which a check is drawn by one of its depositors may decline payment because of insufficient funds of the depositor and pay out the depositor's balance from time to time on smaller checks, although drawn subsequent to the one on which payment was refused, and it is not the bank's duty under such circumstances to refuse payment of the smaller checks so as to build up a balance large enough to meet the first check; but if the bank, when such check was presented, undertook the duties of a collecting agent, its rights and duties depend upon the terms of the agency.
2. Whether the bank in such case assumed the duties of a collection agent is a mixed question of law and fact, to be determined by the jury under appropriate instructions of the court as to the law.
3. The mere refusal of the bank to pay the larger check furnishes no ground for the subsequent refusal of later and smaller checks and the bank may safely pay such later checks if it has not assumed the duties of a collection agent for the holder of the first check, even though, if it had refused payment of the later checks, a balance would have been built up by deposits sufficient to pay the first check.
4. A depositor having an open checking account in a bank may, by agreement with the cashier at or before specific deposits are made, provide that such deposits shall be used to pay certain checks only, and such deposits become thereby appropriated to meet the

designated checks and may not be applied by the banker to other purposes.

5. If, when the Paige check was presented to the bank for payment, the payee was informed by the cashier that it was not good, but that the bank would take it and give him credit for it subject to collection, and credit was given for the check on the holder's pass book, and there were facts and circumstances in evidence tending to show that the bank may have assumed the duties of a collecting agent, it is error to instruct the jury that the sole duty of the bank was to charge the check to the drawer and thus relieve Paige whenever the drawer had sufficient funds to his general credit to pay the entire check at once.

*Hagan & Hagan and William M. Rockel, for plaintiff in error.
George S. Dial and J. E. Bowman, contra.*

RICHARDS, J.

Error to the court of common pleas.

On August 31, 1916, one G. A. Collier drew a check on the Springfield National Bank in favor of William Paige for \$1,037.34. Mr. Collier at that time had a deposit account with the bank, but not of sufficient amount to pay this check and he requested Paige to hold the check a few days. William Paige, the payee of the check, also carried an account in the same bank. The check was presented by Paige to the bank on September 2d, and the testimony is in conflict as to what occurred between him and the cashier at that time. The cashier testified that he informed Mr. Paige that money was not then on deposit in the account of Collier sufficient to meet the check, but that the cashier would hold the check, credit Paige with the amount and enter it in his pass book, subject to a deposit which the cashier presumed Collier would make. He testifies that he informed Paige that the check was not then good but probably would be a little later, and that Paige said "all right." The cashier testified further to the effect that some days after that, Mr. Paige again came to the bank and stated that he was going to want to use some of that Collier money and he was then informed that the check had not yet been paid but that he could go ahead and divide it up, if he wanted to and the cashier would

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take the chance of being made good that afternoon, as he expected a deposit from Collier. Paige did, thereafter, check out a portion of the amount represented by the check. The testimony of Mr. Paige is to the effect that he presented the check at the bank for payment and that it was credited on his pass book and that he had no conversation with regard to there being insufficient funds to pay the same or with reference to having the check left for collection. The amount of the check was, in fact, credited on the pass book of Paige, but the cashier insists that this was done conditionally, while Paige contends that such credit was absolute payment of the check.

Collier, the drawer of the check, became bankrupt shortly thereafter and this action was brought for the purpose of recovering of Paige the amount of the check less the amount of the deposit of Collier applied by the bank toward the payment of the same and less, also, the dividend from the trustee in bankruptcy of the estate of Collier. The testimony tends to show that Collier made numerous deposits in his account in the bank shortly after this check was presented to the bank, but that at no time, at the close of business in the afternoon, was there a sufficient amount in his account to pay the check in full. The amounts deposited by Collier were, in fact, used to pay smaller checks drawn subsequently to the date of the check given to Paige.

The trial resulted in a verdict and judgment in favor of the Springfield National Bank and this proceeding in error is brought to reverse that judgment.

The questions at issue between these parties involve very interesting principles of law as to the rights and obligations of a bank and its customers on the presentation of a check which is in fact for a larger amount than the drawer of the check had on deposit at the time the check was presented. The trial court, at the request of the bank, gave the following five propositions in charge to the jury:

"1. If when Mr. Paige presented the Collier check at the Springfield National Bank, he was informed by the bank that the check was not good, but that the bank would take it and give

him credit for it, subject to collection, and the credit was made in his pass book accordingly, that did not constitute payment of the check by the bank and Mr. Paige remained liable to the bank for the amount of the check unless afterwards Mr. Collier had to his general credit an amount sufficient to pay the entire check at one time.

"2. Such an arrangement did not impose on the bank the ordinary duties of a collection agent for Mr. Paige, but it was only required to hold the check at its banking house and charge it up to Mr. Collier whenever he had a balance to his credit large enough to pay the entire check at once.

"3. Such an arrangement left it still the duty of the bank to pay smaller checks of Mr. Collier that might be presented afterwards and which did not exceed the amount to his credit at the time. It was not the bank's duty to refuse payment of such smaller checks so as to build up a balance in Mr. Collier's favor large enough to pay the check left by Mr. Paige.

"4. Such an arrangement did not prevent the bank permitting Mr. Collier to overdraw his account in anticipation of deposits to be made later to cover such overdrafts, or from making any other special arrangements with Mr. Collier at his request and to suit his convenience. It did not require the bank to shape its business with Mr. Collier so as to compel the payment of the check left by Mr. Paige, but its sole duty would be to charge that check to Collier and thus relieve Paige whenever and if ever Mr. Collier had sufficient to his general credit to pay the entire check at once.

"5. If the Collier check was left with the bank and the credit given Mr. Paige subject to the collection of the check, then the subsequent writing up of Mr. Paige's bank book would not affect the arrangement or the rights and obligations of the parties."

The general charge of the court was along the same lines as covered by the above special instructions, and the vital and controlling matter for determination in this case is as to whether the charge is a fair statement of the law under the evidence contained in the record. This charge appears to be a fuller and more elaborate statement of the rule laid down in 8 Corpus Juris, 680, in the following words:

"Where a bank declines to pay a check because of lack of funds, it is under no obligation to the holder to reserve from future deposits a sufficient amount to meet the check if it is again presented."

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The rule as thus stated is the one applicable in the absence of any agreement between the bank and the payee of the check. The same rule is announced in *Gilliam v. Merchants National Bank*, 70 Illinois Appellate Reports, 592, the reason being that there is no presumption that the check remains outstanding for payment. But, in the case at bar, the check was in fact left by Paige with the bank and for this reason the bank is chargeable with knowledge that the check was not paid, if such was the fact. See also: *Henderson & Co. v. United States National Bank*, 59 Nebraska, 280; *Lowenstein & Bros. v. Bresler*, 109 Ala., 326; *Harrington v. First National Bank*, 85 Ill. App. Reports, 212; *Coates v. Preston et al*, 105 Ill., 470.

A summary of the rule is stated in 2 Morse on Banks and Banking, Section 450, in the following language:

“The fact of presentment for payment of an overdraft, appears to have no legitimate effect whatsoever upon the balance of the customer. It creates no lien upon it of any description; no sound reason suggests itself why it should be regarded as affecting it at all. The bank is in no possible shape the agent of the holder of such overcheck, to aid in securing him payment in full; whence it seems to follow that the *simple refusal, without more*, of the larger check furnishes no ground for the subsequent refusal of the later and smaller one.”

The rule as stated is undoubtedly applicable in a case where a check which amounts to an overdraft is presented for payment, payment refused, and nothing more said and the holder of the check carries the same away with him. But we do not understand that this rule as laid down is applicable, without qualification, to a case where the bank retains possession of the check and evidence is introduced tending to show an arrangement between the bank and the holder of the check, which might, if the jury so find, modify what the rights of the parties would be in the absence of an agreement. See 2 Morse on Banks and Banking, Section 572.

We think there can be no question that if a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of the bank in giving the credit is equivalent

to a payment in money, if nothing is said to indicate a different result, even though the bank should later ascertain that the drawer of the check was without funds to meet the same, but it is also true that the bank could have received the check conditionally. 3 Ruling Case Law, 526.

It is for the jury to say, under the instructions of the court as to the law, whether the evidence introduced in this case as to what occurred when the check was presented and subsequently, when it is claimed permission was given to withdraw a part of the amount represented by the check, established any agreement which would govern the rights of the parties. With such evidence in the record, the trial judge went too far in stating the rule as he did, without qualification, that no duty rested on the bank to apply any part of the deposits of Collier to the payment of the check given to Paige. The rights of Paige under the circumstances disclosed by the evidence would not rest solely upon the principles of law announced, without considering whether the evidence established an agreement which would impose upon the bank the duty to apply to the payment of the Paige check such unappropriated funds of Collier as were in his account or might thereafter be deposited.

The bill of exceptions contains some evidence which is not, however, very clear, tending to show that Collier, who was purchasing grain and hay, paid for the same with checks on the Springfield National Bank, and that some of these checks would be presented at the bank when there were no funds in the bank to meet the same, and that under those circumstances the cashier of the bank would call Mr. Collier on the phone and Collier would ask that such checks be paid and promise that he would make deposits during the day to cover the same. If such an agreement, made before or at the time that such deposits were made, should be established by the evidence, then the funds so deposited for such purpose, would be appropriated to meet the payment of the specified checks and money so appropriated could not properly be used by the bank in the payment of the check given to Paige. The importance of distinguishing whether funds deposited have or have not been appropriated to specific purposes is clearly indicated in the old case of *Kilsby v. Williams*

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et al., 5 Barnwell & Alderson's Reports, 815. The original report of that case, published in 1822, contains the following head-note or syllabus:

"A plaintiff paid into his own bankers, a cheque of 250 pounds drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of the cheque paid in a sum of money, part of which he appropriated, leaving a balance unappropriated of 237 pounds. The bankers, who were then creditors of the drawer to a large amount, wrote on the next morning to the plaintiff stating that the cheque was not paid but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's cheque. *Held*, that, under these circumstances the plaintiff might maintain money had and received against the bankers, and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of the plaintiff and paid by them."

See, also, *Johnson v. Parker Savings Bank*, 101 Penn. State, 597; *Wilson et al v. Dawson et al*, 52 Ind., 513; *Bank of the United States v. Macalester*, 9 Penn., 475.

The charge to the jury in this case ignores the fact that there is a conflict in the evidence as to what occurred between Paige and the cashier of the bank, and fails to give due consideration to the claim that the bank assumed the duties of a collection agent. If the jury should find that the conversation between them amounted to an agreement, in relation to what should be done by the bank with the check and with the deposits of Collier made or to be made, such agreement might have an important bearing on the rights of the parties and the court was in error in withdrawing from the consideration of the jury the effect of the testimony on this subject.

We find no prejudicial error in the case, except in the charge of the court in relation thereto, but for error in the charge the judgment must be reversed and the cause remanded for a new trial.

ALLREAD and FERNEDING, JJ., concur.

DECISION ON RE-HEARING.

(Rendered April 22, 1919.)

BY THE COURT.

RICHARDS, ALLREAD and FERNEDING, JJ., concurring.

Counsel for defendant in error contend that the bank accepted the check in controversy merely as accommodation and that it assumed no additional responsibility.

The bank's evidence upon which the case rests was to the effect that it received said check and entered the same upon the holder's pass book subject to a future deposit or subject to collection.

We can not escape the conclusion from the bank's evidence that it acted in the dual capacity of drawee and collecting agent.

As a mere drawee the bank might have refused the check and paid out the depositor's balance from time to time on smaller checks.

As collecting agent, however, the bank assumed a fiduciary relationship to the check holder. *Jones v. Kilbreth*, 49 O. S., 401; *Hilsinger v. Trickett*, 86 O. S., 286; *Kilsby v. Williams* (cited in the original opinion).

The scope of the agency is thus stated by Judge Spear in *Hilsinger v. Trickett*, at page 298:

"The delivery of the certificate in the manner shown by the admitted facts was a delivery for collection—of course to result in liability on the part of the bank in case of collection, and imposing the duty of reasonable diligence in efforts to collect."

It is true that the bank in the discharge of its fiduciary obligation would be governed by the general custom of the banking business as to collections, but that limitation would not justify the bank in assuming an attitude inconsistent with the trust or of thwarting the execution of the trust by paying the funds otherwise applicable to the plaintiff's check to the drawer or upon checks subsequently presented.

By the Ohio rule it is true that the payee of a check obtains no right or interest in the deposit unless accepted. Nevertheless

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the drawee may by acceptance, absolute or conditional, fix an obligation in favor of the check holder to be discharged out of present or future unappropriated deposits.

The issuing of a check confers implied authority upon the drawee to accept and discharge the same out of the drawer's funds.

Whatever valid obligation is assumed by the drawee in the acceptance of a check is binding upon the drawer.

The drawer obtains no superior right by the over-issue of checks nor does the issue of subsequent checks operate as a cancellation of a former one. The rule that a bank may refuse a check in excess of the deposit and honor subsequent checks within the balance applies only where the bank acts exclusively as drawee and assumes no obligation to the holder of the larger check. Counsel for defendant in error present a persuasive argument in favor of the contention that the bank was not under obligation to make a *pro tanto* payment upon the Paige check, without special authority. The cases of *Lowenstein v. Bresler*, 109 Ala., 326, and *Bank v. Bank*, 127 Tenn., 288, are cited. The case at bar differs somewhat from these cases because the collecting agency in the instant case was of a continuing character. The bank agreed to hold the Paige check for a future deposit. In both the Alabama and Tennessee cases the checks were returned before the deposit because sufficient to pay the checks. In neither of these cases did the bank undertake to hold the check for a future deposit. Here the bank pursuant to the agreement held the Paige check while deposits were made in excess of the amount of the check. There was evidence from which the jury might have found that Collier's unappropriated deposits amounted to more than the Paige check and the jury should, therefore, have been instructed as to this feature of the case.

Counsel for defendant in error contend that there was no such acceptance of the Paige check as to create an obligation against the bank, citing *Savings Co. v. Walker Co.*, 92 O. S., 406. The check there had been accepted and paid by the drawee bank upon a forged endorsement and the question was whether such acceptance operated in favor of the real owner of the check. The court held that it did not. The decision was based upon the

theory that the payment under the forged endorsement was void; that the check remained a living instrument under the law merchant, and that a written acceptance was required to bind the drawee. It is evident, we think, that the court did not intend to cover the question of acceptance for payment or of a constructive acceptance under other sections of the negotiable instrument act.

Here the check was presented for payment and entered upon the depositor's pass book. This would create a *prima facie* obligation in favor of the payee as depositor and against the bank and the burden would be upon the bank to defeat that obligation by showing the non-fulfillment of the condition upon which the check was accepted for payment. But independent of that, if the bank assumed the fiduciary relation of collecting agent it stepped outside the strict rules of the law merchant and became bound by the general rules of the law of agency subject only to banking customs in making collections.

This is an important case and we have endeavored to give it the consideration which its importance demands, but upon full consideration are unable to escape the conclusion that the former decision should be adhered to.

Judgment adhered to on re-hearing.

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Wayne County.

TRANSFER OF SCHOOL DISTRICTS.

Court of Appeals for Wayne County.

ASA EWING V. CHARLES SCHOFF, AUDITOR OF WAYNE COUNTY,
OHIO, ET AL.

Decided, February 5, 1919.

Schools—Payment of Bonds of a Transferred District—Can be Satisfied upon the Consolidated District—And Pre-existing Indebtedness Must be Met by the New District.

In transferring an existing school district to an adjacent rural school district an agreement that the territory so transferred shall be relieved from payment of its outstanding indebtedness is without authority of law, and demurrer lies to a petition for a perpetual injunction against the levy of any tax upon property outside of the transferred district for payment of bonds issued by said district prior to the transfer.

Weygandt & Ross, for plaintiff.

Joseph McGhee, Attorney-General, *William J. Ford* and *Benton G. Hay*, Prosecuting Attorney, contra.

HOUCK, J.

This is an appeal case and is here on demurrer to the petition of plaintiff.

From the petition it appears that on the 3d day of May, 1917, the county board of education of Wayne county, acting under the provisions of Section 4692, G. C., as amended 106 O. L., 396, by resolution duly adopted, transferred the whole of Doylestown village school district, in said Wayne county, Ohio, to Chippewa rural school district in the same county; that at the time said transfer was made the village district had an outstanding bonded indebtedness of \$12,000, and that it was agreed that if said transfer be made it was to be free of indebtedness to the transferee, and that the village district was to remain intact for the disbursement of its then indebtedness; that the county auditor

had already made a general levy upon all the taxable property of plaintiff and other taxpayers of said Chippewa rural school district for the payment of said bonded indebtedness, etc.

Plaintiff prays that the defendant, the county auditor, be perpetually enjoined from the levy of any tax upon plaintiff to create a sinking fund for the retirement of said bonds, and prays the defendant, the county treasurer, be enjoined from collecting such tax, etc.

The question here presented—Is the demurrer well taken?

The general rule of pleading is that the want of essential allegations necessary to be set forth in a cause of action or defense renders same subject to demurrer. Does the petition in the present case stand this test?

We have examined all the sections of our school laws referred to by counsel in the case, and we are clearly of the opinion that the county board of education had full and complete authority in the premises to do just what it did with reference to the transferring of the school territory in question. However, we find no authority in law for the alleged agreement between the county board of education and the village board of education that the transfer of said territory should be free of said bonded indebtedness, and that being so, it neither adds to nor takes from said petition anything so far as it affects the rights of the parties hereto with reference to the demurrer.

In their attempt to make this so-called agreement said boards of education exceeded their authority and as such members of said boards of education are not bound thereby.

We think the rule in Ohio is well fixed that when territory for school purposes is transferred pursuant to statutory authority, as is clearly admitted in the petition now before us, that those residing in such annexed territory may be taxed to pay pre-existing indebtedness embraced in the new territorial district.

If this rule of law is sound then the allegations of the petition of plaintiff are not sufficient in fact and law to grant the relief sought. It follows that the demurrer is well taken and should be sustained. Demurrer sustained.

POWELL and SHIELDS, JJ., concur.

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APPROPRIATION BY A FOREIGN RAILWAY COMPANY.

Court of Appeals for Pike County.

THE CHESAPEAKE & OHIO NORTHERN RAILWAY COMPANY v.
KEZIAH D. AND JOHN W. BARGER.*

Decided, January 9, 1919.

Appropriation—Proof Required of a Foreign Corporation—Right of Eminent Domain—Organization of New Company by Officers and Employees of Existing Company—Necessity of Appropriation.

1. In the trial of an action by a foreign railroad company to appropriate private property for railroad purposes in this state it must prove its *de jure* existence according to the law of the state where organized.
2. Section 8759 expressly confers upon a foreign corporation which owns and operates a railroad the right of eminent domain in this state, and hence in such action it is not necessary to prove that the laws of the state in which such corporation was organized confer upon it such right.
3. The legislative acts of a sister state may be proved in the courts of this state as provided by either Section 905, revised statutes of the United States, or Section 11498 of the General Code of Ohio.
4. Officers or employees of one railroad company may legally organize another for the benefit of the former, if they, acting for themselves as individuals, subscribe and pay for their stock, elect directors and comply with the forms of law in perfecting the organization.
5. In the trial of an action by a railroad company to appropriate property for its right of way, it is not necessary to show that its directors have by resolution declared it necessary to appropriate the land described in the petition.

Bannon & Bannon and Levi B. Moore, for plaintiff in error.
C. E. Blanchard, Robert J. O'Dell and G. W. Rittenour, contra.

SAYRE, J.

This court is called upon to determine the following questions:

* For previous opinions in same case see, 28 O. C. A., 92, and 21 N. P. (N.S.), 97.

(a) When, in a proceeding by a railroad company to appropriate land for a right-of-way, the court of common pleas affirms the probate court and both judgments are reversed by this court, shall the cause be remanded to the probate court or to the court of common pleas for a new trial?

(b) Is it necessary for the plaintiff to prove its incorporation according to the laws of Kentucky, and that the power of eminent domain has been conferred upon it by such laws?

(c) Must such proof be offered as is required by Section 11498?

(d) Is the plaintiff a dummy corporation?

(e) Is it necessary for the plaintiff to prove that its board of directors, prior to the filing of the petition, passed a resolution declaring that it was necessary to appropriate the premises described in the petition?

(f) Was evidence offered to show that the plaintiff was unable to agree with Keziah D. Barger?

1. The judgment of the probate court in the original action was affirmed by the court of common pleas and upon a reversal of both judgments by this court the cause was remanded to the court of common pleas for a new trial. The case has been retried in the court of common pleas and is here upon a proceeding in error, and defendants in error are, by cross-petition in error, challenging the former ruling of this court in remanding the cause to the court of common pleas for a new trial.

While this court is of the opinion that the Legislature intended that a new trial should be held in the court of common pleas, whether that court affirms or reverses the probate court, yet from the report of the case of *Pittsburg, Cleveland & Toledo Railroad Co. v. Todd*, 72 O. S., 156, and the case of *Cemetery Ass'n v. Cleveland, Bedford & Geauga Lake Traction Co.*, 93 O. S., 161-182, we have concluded that the Supreme Court holds otherwise; and believing that if the question was presented again to that court it would stand by its former action, we have decided to remand the case to the probate court for a new trial.

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2. It is necessary for the plaintiff to prove its incorporation according to law. (*Cemmetery Ass'n v. Traction Co.*, 93 O. S., 161). And whether it is incorporated according to law is to be determined by the law of the state where it is organized. (*American Ball Bearing Co. v. Adams*, 222 Fed., 967). However, it is contended that by a recent amendment of Section 8759 (105-106 O. L., 347), the power of eminent domain is expressly conferred on foreign corporations owning and operating a railroad. That section as amended reads in part as follows:

"A company, domestic or foreign, or municipal corporation which owns or operates a railroad, may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as it deems necessary for its railroad * * * ."

This seems to us to be a clear grant of the right of eminent domain to a foreign corporation which owns and operates a railroad. This right being granted by our statutes to a company organized under the laws of Kentucky, it was not necessary to prove the right of eminent domain conferred upon plaintiff by Kentucky laws, because there was proof offered that the plaintiff owned the railroad constructed by it from Edgington to Waverly.

3. Oral evidence was admitted to show that Carroll's Kentucky Statutes, 1915, 1916 Kentucky Acts of Legislature and 1917 Kentucky Acts of Legislature, contain all the general statutory law of the state of Kentucky, and these volumes were produced in court. The sections of the statutes which authorize the association of persons to form corporations for the purpose of constructing and operating railroads are found in Carroll's Statutes. There was no evidence that these were published by the authority of the state of Kentucky as required by Section 11498, General Code of Ohio, nor do they purport to be published by the authority of the state of Kentucky. However, the sections of the statutes referred to, typewritten and certified to by the Secretary of State of the Commonwealth of Kentucky, to which was affixed the seals of that commonwealth, were admitted in evidence.

Section 905, Revised Statutes of the United States, provides that,

“The acts of the Legislature of any state * * * shall be authenticated by having the seals of such state * * * affixed thereto * * *.”

“The federal statute does not provide an exclusive method for proving legislative acts of a sister state, but if proof is made in accordance with its provisions such proof is sufficient. (*Title Guarantee & Trust Co. v. Trenton Potteries Co.* (N. J.), 38 Atl., 422, *Ridpath v. Heller* (Mon.), 129 Pac., 1054, *Hewitt v. Indian Territory Bank* (Nebr.), 92 N. W., 741).

We understand the law to be that if proof is made in accordance with either the federal or Ohio statute no more is required.

4. Is plaintiff a dummy corporation?

The record discloses the following facts:

1. In order to carry freight, principally coal, from the Chesapeake and Ohio Railway Company, in Kentucky, to the Hocking Valley Railway Company, now controlled by the Chesapeake and Ohio, it was important to the former to have a railroad constructed from Edgington, Kentucky, to Valley Crossing, near Columbus, Ohio, and the plaintiff, the Chesapeake & Ohio Northern Railway Company, was organized for that purpose.

Mr. M. J. Caples, elected president of the plaintiff at the first meeting of directors, testified as follows:

“Q. How does it happen that these men that are directors of the C. & O. Railway all became directors of the C. & O. Northern?”

A. Because the Chesapeake & Ohio Northern is a subsidiary of the Chesapeake & Ohio; was intended, was built principally for the purpose of handling the business of the Chesapeake & Ohio.

Q. So that the C. & O. desired to have complete control of the management of the C. & O. Northern?

A. Yes * * *

Q. Why didn't the C. & O. build it under its own name?

A. Because the C. & O. had no right to do business in Ohio at that time, and it is much easier to organize a new corporation

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to build such property than to extend the operation of another one. It was a matter of convenience. We discussed this matter quite fully with the Public Utilities Commission of Ohio as to how we might organize for the purpose in it. This road was built with the idea of improving the transportation facilities of the C. & O. Nothing to conceal about it. We want everything known that we know ourselves. * * *

Q. And the Chesapeake & Ohio Railway financed the Chesapeake & Ohio Northern all the way through, has it not?

A. Yes, except a few shares purchased by the individual shareholders.

Q. Those shares purchased by the individual share holders were for the mere purpose of qualifying them as officers, were they not?

A. Yes."

2. The incorporators, original stockholders and directors were officers or employees of the Chesapeake & Ohio.

3. The Chesapeake & Ohio Northern was organized with a capital stock of fifty thousand dollars, divided into shares of the par value of one hundred dollars each.

4. Six of the original stockholders subscribed and paid for three shares each, and one subscribed and paid for two hundred and thirty-two shares of the capital stock.

5. The alleged incorporation was completed in May, 1914. The first meeting of directors was on May 29, 1914.

6. July 23, 1914, the capital stock was increased fifty thousand dollars. October 2, 1915, the capital stock was increased to three million five hundred thousand dollars.

7. This suit was commenced January 24, 1916. At the trial of this case in July, 1918, the Chesapeake & Ohio Railway Company owned all the stock of the plaintiff company except twenty-one shares owned by five individuals, of whom two were of the seven original stockholders.

In *Cemetery Ass'n v. Traction Co.*, 93 O. S., 161, it appears that the party seeking to appropriate the land never kept any books of account or bank books, or certificate books; that while one director paid in the ten per cent. of the authorized capital stock there was no record of it, and that the other directors never paid for their stock at all. It did further appear in that case

that the Cleveland, Bedford & Geauga Lake Traction Company was the creature of the Northern Ohio Traction & Light Company. In *American Ball Bearing Co. v. Adams*, 222 Fed., 967, no money whatever was paid by any of the incorporators but the ten per cent. of the authorized capital stock was paid by one of the three companies for whose benefit the dummy corporation in that case was attempted to be organized.

Consideration of these two cases leads fairly to the conclusion that whether an organization may be adjudged a dummy corporation or not depends upon whether the original incorporators and stockholders, excepting the case of a proper gift of stock, subscribed and paid for their stock and were interested to the extent of the amount of such stock in the fortunes of the organization. If they are so interested it is of no consequence how much more they may be interested in some other organization. There is no Ohio law at least which prevents officers and employees of one corporation from organizing another, although for the benefit of the former, if they subscribe and pay for the stock of the latter, and thus become interested in good faith in it. Besides, by virtue of Section 8806:

“A company may aid another in the construction of its road, by means of subscription to its capital stock, or otherwise, for the purpose of forming a connection of the roads of the companies, if the road of the company so aided will not when constructed form a competing line.”

The evidence shows that the two roads referred to in this case will not be competing lines.

By the provisions of this section one company may purchase substantially all the capital stock of another and absolutely dominate it, and as this may be purchased at any time the condition of things which appeared on the trial of this case, to-wit: an effort to appropriate land by one corporation, whose stock was almost entirely owned by another, did not deprive the appropriating corporation of its right of eminent domain, since its incorporation was effected in good faith and in accordance with the forms of law. The plaintiff has never been a dummy corporation, as it seem to us.

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5. Objection was made to the proof of the minutes of the plaintiff showing the meetings of incorporators, directors and stockholders. It is contended that they are not sufficiently identified.

Mr. Caples, who signed the minutes as chairman, identified the book as the minute book of the plaintiff company and testified that he was present at all the meetings. The assistant secretary of the company testified that the book offered in evidence was the minute book of the company and that he was the custodian of the same although he did not prepare any of the minutes. The fact that the minutes are authenticated by an officer whose duty it was to sign them and the book was identified as the record of the corporation by its custodian is sufficient proof of the book and its contents.

6. The former opinion of this court holding that the plaintiff must show that its directors have declared by resolution that it was necessary to appropriate the land described in the petition is erroneous. The statute has not conferred the power to determine the necessity for the appropriation upon the corporation seeking to appropriate the land for railroad purposes, but upon a court. The issue before the probate court is whether there is a necessity for the appropriation, and if the resolution of the plaintiff's board of directors is introduced in evidence it must be to prove that issue. Such resolution, if introduced in evidence, would express the opinion of a certain number of individuals that it was necessary to appropriate the premises described in the petition. This opinion of the directors would be fatally defective as evidence upon the issue as to whether or not it was necessary to the plaintiff to make the desired appropriation. The question for the probate court is not whether in the opinion of the plaintiff's directors the appropriation is necessary, but whether it is necessary. This is a question to be determined by evidence, as in other cases, with the burden of proof on the plaintiff. Suppose the defendant was a railroad company and offered a resolution of its board of directors stating that there was no necessity for the appropriation, certainly no one would contend that such resolution would be admissible. And yet no one can point out any difference as to the probative value on the issue of

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necessity between such resolution and one passed by the board of directors of the plaintiff.

The question of necessity is a judicial one for the probate court, and only such proof as is admissible under the rules of evidence can be received on such issue, and a resolution by the board of directors of the plaintiff company declaring the appropriation of the property in question a necessity is no evidence whatever of such necessity. (*State v. Proprietors* (N. J.), 33 Atl., 252).

7. There is no evidence in the record to show that the plaintiff was unable to agree with defendant, Keziah D. Barger, although it appears that she is the wife of John W. Barger, with whom the evidence shows inability to agree. The mere fact that they are husband and wife is not sufficient to show that the husband had authority to act for his wife in the matter. The statute requires plaintiff to show inability to agree with the owner, and if there is more than one owner then proof must be offered of inability to agree with the owners.

The judgment will be reversed and the cause remanded to the probate court for a new trial.

Judgment reversed.

HOUCK, J., and WALTERS, J., concur. (HOUCK, J., of the fifth district, sitting by designation in the place of MIDDLETON, J., of the fourth district).

LIEN OF MATERIALMAN.

Court of Appeals for Cuyahoga County.

OSCAR T. MAYER ET AL, PLAINTIFFS, V. JOHN NEMETH ET AL,
DEFENDANTS.

Decided, June, 1919.

Mechanic's Liens—Purpose of the Provision of Section 8313 for Notice—Owner must Require Affidavits—Sections 8312, 8313, 8314.

One who has furnished material to a general contractor, for use in the construction of a building for the owner, and has filed a lien within the statutory time and served notice thereof upon the owner as

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provided in Section 8314, will not be deprived of his lien because of failure to furnish the notice required by Section 8313.

Buckley, Hauxhurst, Saeger & Jamison, for plaintiff.
E. C. and Geo. H. Schwan, for defendants.

DUNLAP, J.

Appeal from the Court of Common Pleas.

These cases are here on appeal from the court of common pleas. Inasmuch as the cases are submitted upon an agreed statement of fact, there is involved only the law applicable to those facts, and the whole matter at issue may be very simply stated in the form of a question, viz.: Will a materialman who has furnished materials to a general contractor for use in constructing a house for the owner, and who has filed a lien within the statutory time and duly served the notice of same upon the owner as provided in Section 8314, General Code, be deprived of the fruits of his efforts and his lien be held invalid because he has not furnished the notice provided for in Section 8313, General Code? We shall not enter into any long discussion of the mechanic's lien law of Ohio in attempting to answer this question.

To us it seems that the question should be answered in the negative; that the notice provided for under Section 8313, General Code, is not intended as a prerequisite to the attaching of a lien; that it is intended only as an extra safeguard to the materialman, sub-contractors and laborers to protect them from the consequences of being left off the contractor's affidavit.

The provision of Section 8312, General Code, to the effect that any payments made by the owner to a general contractor before he had received affidavits from the general contractor, shall be made at his peril, admits of no interpretation which will excuse the owner from requiring such affidavits. Our holding here is in accord, we believe, with the holdings in similar cases both in this and other states having similar provisions in their mechanic's lien laws, and the question here presented is hardly a debatable one since the dictum of this court through Meals, J., in the case of *Schraff v. Brennan*, No. 1362, decided February 14, 1917.

A holding exactly similar to the one we are making here was made by the Supreme Court of Michigan in applying a section of its mechanic's lien law practically identical with the one under consideration. It will be sufficient to simply refer to it. *Smalle v. Ashland Brown Stone Co.*, 114 Mich., 186.

This decision was followed later in the case of *Blitz v. Field*, 115 Mich., 675. We experience no difficulty in reaching a similar conclusion in applying our own law.

It follows that a decree may be drawn foreclosing the liens and granting the relief prayed for.

WASHBURN, J., and VICKERY, J., concur.

**COMPETENCY OF TESTIMONY AS TO A PREVIOUS ARREST
OF THE DEFENDANT.**

Court of Appeals for Wayne County.

JOHN BALLARD V. THE STATE OF OHIO.*

Decided, January Term, 1919.

Criminal Law—Relevancy of Previous Conduct and Acts of a Defendant—Permissible to Infer Intent from Other Acts than that Charged in the Indictment—Instruction to Jury with Reference to Testimony Relating to a Former Arrest—Complaint of Misconduct of Prosecuting Attorney in Argument to Jury—Election between Counts.

1. Prejudice can not be based upon the admission of testimony, the recital of which incidentally disclosed a previous arrest and detention of the defendant; on the contrary intent may sometimes be inferred from former criminal acts of the defendant, where the testimony relating to such acts is sharply limited in its application to its bearing on the question of intent in the case under consideration.
2. In order that advantage may be taken of the alleged misconduct of a prosecuting attorney in his argument to the jury, it is necessary that objection be entered at the time and if overruled an exception be taken to the action of the court in so doing.

* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 13, 1919.

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Kean & Adair, for plaintiff in error.

Benton G. Hay, Prosecuting Attorney, contra.

SHIELDS, J.

The plaintiff in error, John Ballard, prosecutes error to reverse the judgment of the court of common pleas of said Wayne county wherein he was convicted and sentenced for pocket-picking.

While the petition in error filed herein contains numerous grounds of alleged error, but three grounds only were argued and relied on:

1. Error of the court below in the admission of incompetent evidence upon the trial.

2. Error of said court in overruling the motion of the defendant below to compel the state to make an election under the two counts in the indictment upon which a conviction was claimed.

3. Misconduct of the prosecuting attorney.

1. It appears that during the trial testimony was given by one Christy Marks, assistant chief of police at Mansfield, O., and a witness for the state, that both the plaintiff in error and one Harry Martin, who together were arrested and charged with said offense, stated soon after their arrest that they were not acquainted and known to each other until the day before their arrest, having met and become acquainted with each other at Alliance, Ohio, on said day, as appears on page 31 of the bill of exceptions. Like testimony was also given by one Frank Mitchell, also a police officer at Mansfield, Ohio, and a witness for the state, as appears on page 36 of the bill of exceptions. To contradict these statements and as tending to show that they were not true, the state introduced several police officers of Chicago who testified that said Ballard and Martin had been seen together in said latter named city before their said arrest for the offense here charged; that said Ballard was known in Chicago under several different names, and that on one occasion, some ten days before said arrest, said Ballard and Martin were seen and known to have been together at the Dearborn street railroad station in Chicago when and where they were arrested and

taken in charge by the police of Chicago and taken to a police station in said city. A deposition of one Charles L. Logue was also introduced on behalf of the state who testified that said Ballard and Martin were seen together at said railroad station at said time, and who with the witness William Sullivan further described the circumstances under which they were taken into the custody of said police officers at said time. Objection was made to the foregoing testimony and exceptions taken to the action of the court below in admitting it, for the reason, as claimed, that it tended at least to cast criminal suspicion upon the plaintiff in error and therefore its effect was prejudicial to him. This action upon the part of said court in admitting said testimony is assigned as error for which it is contended that the judgment of conviction and sentence should be reversed.

Under the statement referred to that said Ballard and Martin were strangers and not known to each other until they met the day before their arrest, it was not claimed but that it was competent to show that they were seen together before that time in Chicago as tending to show that they were acquainted and were known to each other, and that their said statement was therefore untrue, but it was urged that said court erred in permitting said witnesses to give testimony as to the circumstances under which they were thus seen, especially in reference to the fact that they were taken into custody by the police at Chicago and taken to the police station. By referring to page 80 of the bill of exceptions we find that the trial court in instructing the jury upon the foregoing testimony cautioned the jury as follows:

"Now certain testimony of gentlemen from Mansfield and Chicago has been admitted to you, and the object of this testimony was not to prove to you that the defendant was guilty of committing some other crime. You should ignore testimony that has come to you in the case on that point.

"I will say to you that you must convict the defendant, if you convict him at all, on the evidence of this crime, the crime charged in the indictment, and not use any evidence, if you have received any, of any other crime. But the testimony of these witnesses from Chicago and those from Mansfield was

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offered to prove to you, as claimed by the state, that the defendant and the gentleman named as Harry Martin or Morton were acquainted with each other there, and knew each other before the day or time of the crime and at the time of the crime; that was the object of that testimony."

It appears that the foregoing instruction clearly stated the object for which the testimony referred to was given, with the direction clearly expressed that it was permitted to be given for a specific purpose, and to be considered by the jury for that purpose only. Had the court seen fit to do so, said instruction given, in our judgment, might have been extended so as to include other recent acts of the defendant below of the same character, if such acts were shown, as bearing upon the motive and intent in the alleged commission of the offenses here charged. It will be noticed that no testimony of any written accusation against said Ballard and Martin, or either of them, charging them with an offense in Chicago, was offered to be given. Counsel for plaintiff in error argued that the facts given in evidence tended to show that they had committed some crime. Not necessarily so, for a party may be arrested, and yet such party may be entirely innocent of an offense subsequently charged. Counsel further argued that the offenses here charged can not be made out by proof that the plaintiff in error may have committed some other crime or crimes. Generally speaking this is true, for the policy of the law is to guard against what might be an indefinite multiplicity of issues, which a party charged with crime is not called upon to meet, nor prepared to meet, and the rule is, therefore, that the trial shall be limited to the accusations made, and that "other distinct unrelated offenses" shall not form the subject of inquiry on such trial. But it is laid down by text writers generally and in many adjudicated cases that "to this general rule there are exceptions which have been permitted from absolute necessity, to aid in the detection and punishment of crime. As stated in Vol. 1, Jones' Commentaries on Evidence, Section 144:

"The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing

purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant."

Again the same author in Section 143 says:

"In criminal cases the conduct of the prisoner on other occasions is sometimes relevant, where such conduct has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intentions in doing the act complained of. The intention with which a particular act is done constitutes often the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon his trial. For the purpose, therefore, of proving the intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from the like mental conditions. Bishop, in his work on Criminal Procedure, after giving various illustrations as to the proper application of this rule in criminal practice, sums up his conclusion in the following words: 'It is, that though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible; and it is also admissible, if it really tends thus, as in the facts of most cases it does not, to prove the act itself.'"

In *Brown v. State*, 26 O. S., 181, Judge Gilmore, speaking for the court in that case, says:

"While the general rule unquestionably is, that a distinct crime, in no way connected with that upon which the defendant stands indicated, can not be given in evidence against him on the trial, this rule is not applicable to a case in which it is clearly shown that a connection, in the mind of the defendant, must have existed between the offense charged in the indictment and others of a similar nature. When such connection exists, evidence of such other offense is admissible, not for the purpose of raising a presumption of guilt on the hypothesis that a man

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who commits one crime will probably commit another, but for the purpose of showing a motive or purpose prompting the commission of the offense laid in the indictment; and being competent for this purpose, it could not have been properly excluded on the ground that it tended to prove the commission of other and distinct offenses." Ruling Case Law, Vol. 10, Section 105; Chamberlayne on Evidence, Vol. 4, Section 3222; Underhill on Crim. Evidence, Section 90; Wharton's Crim. Evidence, Sections 884-5; *People v. Molineaux*, Book 62 L.R.A., 193-308.

If we were left to judge of the character of the testimony referred to, in the light of this record, we would unhesitatingly say that it developed a unity of design and part of the same scheme illustrated in the Orrville incident, as found by the jury in the case at bar. We are of the opinion that the action of the trial court in admitting said testimony was justified by the facts appearing in the record and that in admitting it there was no prejudicial error.

2. As to the second ground of error, it appearing that the offenses charged in the indictment arose out of the same transaction, the motion to compel the state to elect upon which count in the indictment it relied for conviction, was properly overruled. *Bailey v. State*, 4 O. S., 441; *State v. Bailey*, 50 O. S., 636.

3. The third ground of error charges misconduct on the part of the prosecuting attorney in the trial of the case. We have examined the record with reference to this ground of error and fail to find that any exception was taken to the statement alleged to have been made by the prosecuting attorney in his argument to the jury, and we also fail to find that any objection was made to the trial court, or to any ruling made thereon authorizing any action by a reviewing court. Aside from the question raised by the state in reference to the record being silent as to what was said by the prosecuting attorney in reply to the challenge made by counsel for plaintiff in error in argument, in order to avail himself of the error claimed it was incumbent upon counsel for plaintiff in error to have made their objection to the court, and if overruled, to take an exception to the action of the court. *Davis et al v. State*, 20 C. C., 431-437.

Although not argued, an additional ground of error in the petition in error is that "the verdict is not sustained by the evidence and the law." It appears that the requests submitted on behalf of the plaintiff in error to be given in charge by the court to the jury were given, and the charge of the court, in our judgment, contained a correct statement of the law applicable to the case.

As to the evidence, we have no hesitancy whatever in saying that a reading of this record clearly shows that the jury were well warranted in finding the verdict returned by them. Under the testimony, it is apparent that the plaintiff in error and his pal, the latter of whom succeeded in eluding the vigilance of the officers after having been taken into custody and fled, thereby escaping trial, selected this unoffending old man as their victim to be fleeced, on reaching Orrville, when it became known to them that he was to change cars there, and how successfully they worked out their criminal purpose is fully shown by the testimony. With the testimony of the witnesses for the state unopposed, showing unmistakably the scheme planned by these "gentry with velvet fingers" to relieve their selected victim of his money as he was jostled by them in the aisle of the car in his attempt to alight therefrom, as shown by the testimony, and after stripping him of his money and leaving the old man, perhaps in a strange city, at the midnight hour, penniless, they hastily sought other quarters on the train in fancied security with their plunder. With the uncontradicted facts of the case before us, we are unanimous in our opinion that the verdict of the jury was fully sustained by the evidence and the law, and finding no error in the record prejudicial to the plaintiff in error, the judgment of the court of common pleas will be affirmed. Exceptions.

HOUCK and PATTERSON, JJ., concur.

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RESTORATION OF STREETS AFTER REMOVAL OF TRACKS.

Court of Appeals for Knox County.

CITY OF MOUNT VERNON, OHIO, v. B. BERMAN AND MATTHEW
REED, PARTNERS AS BERMAN & REED.*

Decided, April Term, 1918.

*Street Railways—Abandonment of Line and Removal of Tracks—Parties
Buying Rails and Ties for Junk—May be Required to Insure Restor-
ation of Streets to Normal Condition—Statutory Obligation of Mu-
nicipality to keep its Streets Free from Nuisance—Implied Oblit-
gation of Railway Company to Protect the City and Its Property
Owners—Grounds for an Injunction—Insolvency of Defendants—
Sufficient Remedy at Law—Provisions of Contract Embodied in
Ordinance should be Construed in favor of the Municipality.*

Where a traction company voluntarily abandons the privileges granted to it by a municipal franchise, bond may be required securing the city that its streets will be left in as good condition as before the ties and rails were removed.

POWELL, J.

This is an action for injunction and is in this court on appeal from the judgment of the court of common pleas of this county. The defendants are the purchasers of the property of the Mt. Vernon Railway Company, a corporation, whose franchise had been forfeited and whose property was sold under an order of the court of common pleas at receiver's sale. A large part of the property so sold consists of a line of railway track on several of the streets of the city of Mt. Vernon for the operation of a trolley system of car lines in said city. Some parts of the property so sold have been removed. Such parts of the railroad tracks as could not be removed without injury to the streets on which they are located are still in place where located when said

* Judgment reversed and holdings of the dissenting opinion affirmed by the Supreme Court, May 13, 1919.

track was last laid. It is to prevent the removal of these parts of the track until a bond or other security is given conditioned that defendants will relay the paving that will necessarily be torn up in removing the rails from the streets. There is no question of ownership. It is conceded that the rails belonged to the railway company whose property has been sold at receiver's sale and that the title to the property passed by such sale to the defendants in this action, who were the purchasers of the same, but subject to any rights or liens that plaintiff might have under the terms of the franchise. Plaintiff claims some such right, which is being worked out in another proceeding in the court of common pleas. In 1907 the city of Mt. Vernon granted a franchise to the railway company for a period of twenty-five years. The ordinance granting the same is a part of the agreed statement of facts on which the case was tried in the court below and on which, in part, the same is tried in this court. All the rights of the parties are to be found in said ordinance and in proceedings had since its passage. The ordinance granting the franchise constitutes a contract when its terms have been accepted by the party to whom such franchise is granted. As is true of every contract, "the rights of the parties are defined by the contract itself." There is no question made as to the validity of the ordinance. It is conceded that it was regularly passed and that all the rights of all the parties to the same are found or merged in the ordinance as it now exists. The contention of the parties grows out of what is claimed to be an implied obligation on the part of defendants to relay the pavement on the streets along the lines of track after the rails have been taken up and removed. This implied obligation is denied by defendants. There is no averment in the petition that the defendants or either of them is insolvent, either at the present time, or prospectively. Nor is there any other ground alleged in the petition which entitles plaintiff to an injunction as prayed for. The ordinance passed by the city February 11, 1918, after said sale had been made, does not affect the rights of the parties in any particular, nor is it sufficient to sustain an injunction, as is asked for by the plaintiff in this action.

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A majority of the court is of the opinion that the rights of the parties hereto are contractual and are determined by the provisions of the franchise ordinance, either by express provisions, or under such implied obligations arising thereon as may be necessary to carry out the purposes for which the contract was made. The ordinance is entirely silent as to the removal of the rails and the other property of the railway company or its successors in title, either at the termination of the franchise or at the forfeiture of its franchise rights. It is a rule of law in this state that

“While much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded.” *Gas Company v. Akron*, 81 O. S., 33.

It is further held in the same case, that where a franchise is not perpetual but indeterminate, the incorporated company may voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom. “But in such case the municipality has no right to prevent the incorporated company from removing its property, nor to take possession of and make use of the same without due process of law.”

We think these rules are applicable in the case under consideration. The rights of the parties are contractual and are fixed and determined by the contract itself. The plaintiff is without right to prevent the defendants from removing their property, provided the same is done with as little damage to the streets of the city as possible. The duty of keeping its streets in repair is upon the city by statute and there is nothing shown in this record that transfers such duty from the city to the defendants. And the presumption arises that the matter of removal of the property of the defendants, when such removal becomes necessary, was considered and taken into account at the time of the passage of such franchise ordinance.

It follows that defendants are entitled to a judgment in their favor as prayed for in their answer and cross-petition. Decree

for defendants. Motion for a new trial, if filed, will be overruled and exceptions may be noted.

HUGHES, J., (of the Third District sitting in the place of Houck), concurs.

SHIELDS, J., (dissenting):

I can not concur in the conclusion reached herein by my associates and the importance of the case leads me to place the grounds of my dissent on record.

As indicated in the majority opinion, the controlling, if not the sole, question presented for determination by the record is, Can a street railway corporation obtain a franchise from the council of a municipality to operate its cars upon the improved streets of such municipality for a stated period, and after laying its tracks on such streets and operating its cars thereon for several years and finding it to be an unprofitable business enterprise, cause the property of such corporation, before the expiration of such period, to be placed in the hands of a receiver and sold to private parties who, to recover possession of the same, undertake to tear up such streets by removing the ties between the brick and the tracks laid thereon, thereby leaving said streets full of holes and rendering the same practically unfit and unsafe for public travel? Can such property be so removed without first requiring said parties to give bond to restore said streets to their former condition of usefulness?

That the ordinance passed by the council of the city of Mt. Vernon became a contract upon its acceptance by the railway company is not open to question. That its successor acquired no more rights than the original grantee is equally true, and, as I view it, whatever rights the city has in this action are referable to the contract originally made with said railway company. Change of ownership by title acquired at judicial sale in nowise affects the terms of such contract.

It appears that the franchise was originally granted to the Mt. Vernon Electric Railway Company, which afterward trans-

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ferred its title and interest in the same to the Mt. Vernon Railway & Light Company, which company afterward became embarrassed and its property was sold as stated. The contract was for the full term of twenty-five years. The injunction below, as shown to this court on the hearing, prevented the defendants from removing any portion of the ties and rails laid on the streets in question, and that none have been removed. Whatever the fact may be in this respect, the defendants claim the right to remove them and the judgment of this court is that they have such right, holding

“that the rights of the parties hereto are contractual and are determined by the provisions of the franchise ordinance, either by express obligation, or under such implied obligations arising thereon as may be necessary to carry out the purposes for which the contract itself was made.”

This holding rests upon the rule of law laid down by the Supreme Court in the case of *East Ohio Gas Co. v. City of Akron*, 81 O. S., 33, which in substance is a reassertion of the rule announced in the case of *Cleveland Elec. Ry. Co. v. City of Cleveland et al*, 204 U. S., 116. In neither of these cases, however, is the question raised or determined as to the manner in which the owning company may take possession of its property at the termination of the franchise period. In the gas company case it is held that,

“The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; but in such case the municipality has no right to prevent the incorporated company from removing its property, nor to take possession of and make use of the same, nor to grant the right to use the same to another company, without due process of law.”

True it is held in that case that the gas company has the right to remove its gas mains laid in the alleys and streets, but it is silent as to the method or manner of removing them. Does it mean that it may dig up the alleys and streets to such a depth as gas mains are usually laid in the ground and after removing its

gas mains leave the alleys and streets exposed and unprotected, for the city to repair in a passable and safe condition for public use and travel? Or does it mean that it may remove its gas mains by restoring the alleys and streets to the same condition they were in before such removal? It would seem that the right to place its gas mains in the ground carried with it the obligation to replace and restore it as before. Under the statute authorizing a railway company to cross a public highway or street it is required that such railway put such highway or street in such condition as not to impair its former usefulness. *State ex rel vs Dayton & Southeastern R. R. Co.*, 36 O. S., 434. And in *Little Miami R. R. Co. vs Commissioners*, 31 O. S., 338, which was also a railroad crossing case, Judge Boynton in announcing the opinion in said case says that "the duty to restore is correlative with the right to intersect or cross." And in the case at bar the right to enjoy the use of the streets imposed the obligation to keep them unobstructed and in repair. While in the cases cited the express provision of the statute forms part of the charter of the railroad company, so here the ordinance granting the franchise contains the express provision with reference to repairs. The ordinance clearly contemplates that the continued use of the streets for public travel should not be interfered with by the construction of this street railway thereon, except such as was necessarily incident to the operation of its cars. Any further grant of power was not delegated to the municipality to exercise. The council acted simply as trustees for the public and its powers were clearly defined by law.

Unlike an ordinary contract between individuals where the contracting parties are privileged to agree to do or not to do certain things, here the contract entered into by the council of the city of Mt. Vernon with the railway company was of a public character. *It concerned the public and was impressed with legislation of a public character.* It affected the property interests of every abutting property owner on the streets on which the tracks of the railway company were and are laid, covering as they do the principal business and residential portions of the city, and it likewise involved the observance of the statutory

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regulation that the streets of the city were to be kept open and free from nuisance, notice of which the railway company was chargeable with when it accepted the ordinance. In the majority opinion herein it is said that,

“the plaintiff is without right to prevent the defendants from removing their property, provided the same is done with as little damage to the streets of the city as possible.”

That the defendants have the right to remove this property is conceded, but the generosity of my associates would limit the exercise of such right to the condition that it be done “with as little damage to the streets of the city as possible.” It is unnecessary to remark that such work would scarcely be done with scrupulous regard for the interests of the city, especially by non-residents of the city. Said opinion further says:

“The duty of keeping its streets in repair is upon the city by statute and there is nothing shown in this record that transfers such duty from the city to the defendants. And the presumption arises that the matter of removal of the property of the defendants, when such removal becomes necessary, was considered as taken into account at the time of the passage of such franchise ordinance.”

As before stated, the controversy here, in my judgment, arises out of a construction of the contract between the city and the railway company and not between the city and the purchasers of this property. But assuming that it is as claimed by my associates, would not the statutory obligation upon the part of the city to keep its streets unobstructed and free from nuisance remain the same? There can be no transfer of this obligation under the law. It is fixed by statute and is beyond the domain of private contract. Hence the condition of the record in this respect, whatever it may be, is wholly immaterial and irrelevant.

As to the presumption following the action of the council that the removal of the tracks might become necessary at the expiration of the franchise period, it is enough to say that the presumption was then as now that the introduction of an electric

railway in a city like Mt. Vernon signalized progress and advancement, and that it was natural to expect that it had come to stay, and that the owning company would not become defunct after half the life of the franchise period expired. But whatever was then in the mind of the council in this respect, I am of the opinion that there is an implied obligation, both moral and legal, resting upon this railway company, and upon those acquiring its property by purchase or otherwise, to protect the city, and through it the interests of the property owners on these streets against a ruthless invasion of their property rights, and that they should be required to give bond as prayed for, for the restoration of the streets to their condition before the work of dismantling the same is commenced. If the suggestion made in said opinion be followed, the inquiry naturally arises, What would the consequences be of allowing the defendants to go forward and tear up these streets at their will, leaving them full of holes, impassable to public travel, and even dangerous to life and limb, as they necessarily would be? What relief would be afforded to each abutting property owner in front of whose property there would be created a standing nuisance, especially in times of rain when the excavations made in the street by the removal of this property would accommodate the accumulation of water? And what would be the extent of the liability of the city in damages for injuries that might be sustained by reason of these exposed and unprotected streets, not to mention its liability under a criminal prosecution for maintaining what would be equivalent to a public nuisance? Is the law powerless to afford relief by injunction against this conditions of things? The answer is that courts of equity are provided to prevent the consummation of threatened wrongs, and the equitable remedy pointed out is by injunction. Parties are not relegated to the slow procedure of courts of law to work out their rights under the circumstances described. In *High on Injunctions*, Vol. 1, Sec. 580, it is laid down that,

“Where the legal remedy is plainly insufficient to meet the requirements of the case and to avert the threatened injury, equity will not compel the person aggrieved to await the tardy action of the ordinary tribunals.”

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Nor are parties obliged to wait until the wrong is done, but they may avail themselves of the power that inheres in a court of equity to stay the hand of the wrong-doer and prevent the perpetration of threatened irreparable injury. As is laid down in High on Injunction, Vol. 1, Sec. 18:

“The remedy by interlocutory injunction being preventive in its nature, it is not necessary that a wrong should have been actually committed before a court of equity will interfere, since if this were required it would in most cases defeat the very purposes for which the relief is sought by allowing the commission of the act which complainant seeks to restrain. And satisfactory proof that defendants threaten the commission of a wrong which is within their power is sufficient ground to justify the relief.”

Of course this is upon the assumption that the petition here and the amendment thereto contain a sufficient statement of the essential ultimate facts entitling the plaintiff to equitable relief, all of which I think duly appears, but it is to be observed that my associates hold that,

“there is no averment in the petition that the defendants or either of them is insolvent, either at the present time or prospectively, nor are there any other grounds alleged in the petition on which an injunction could be based as prayed for in the petition. The ordinance passed after the sale had been made by the city can not and does not affect the rights of the defendants in any particular.”

If the position heretofore assumed is correct, namely, that the purchasers of this property are not relieved of the obligation claimed to be resting upon the original grantee of this franchise, then the want of an averment of the insolvency of the defendants is immaterial; otherwise it might be. Irrespective of this, insolvency alone in the face of this record should not defeat the relief asked for. In High on Injunctions, Vol. 1, Sec. 18, it is laid down that,

“Upon the question whether the mere insolvency of the defendant, unaccompanied by any other circumstances, is sufficient to justify relief by injunction, the authorities are conflicting.

Although there are frequent intimations by the courts that mere insolvency is sufficient ground for equitable interference, yet the weight of the actual adjudications upon the question is clearly to the effect that the mere inability of the defendant to respond in damages at law, although it may be taken into consideration upon an application for the extraordinary aid of equity by injunction, does not of itself constitute sufficient foundation for the relief."

Counsel in their argument for the defendants contended that,

"The petition does not state a cause of action warranting the issuing of an injunction and the facts not only show that it is not entitled to such relief, but to the contrary, that it is not entitled to this relief."

In High on Injunctions, Vol. 1, Sec. 30, it is laid down that,

"The mere existence, however, of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. To deprive a plaintiff of the aid of equity by injunction it must appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law."

It is apparent that the cost of restoring these streets to their former condition of usefulness, including the elements of repair and damage and the interruption to public travel, is so indefinite and uncertain as to place it beyond the possibility of any reasonable computation in damages, thus showing that a remedy at law is not adequate to afford proper relief.

Quoting from the opinion of the gas company case already cited, my associates say:

"While much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded."

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An as abstract proposition of law the foregoing is correct. While it is not the office of courts to read into contracts "something which was intended to be excluded," courts will not hesitate to take notice of that which was clearly intended by the terms of a contract to conserve public interests and protect public property from being destroyed, and further, courts will not hesitate to enjoin the perpetration of a public wrong sought to be committed under the guise of a specious pretext of pursuing individual rights.

While I think that the equities of this case are with the city, and that the relief prayed for should be granted on the grounds and for reasons stated, there is an additional reason that might well be urged why such relief should be granted and that is, that the indefiniteness and uncertainty of the provisions of the contract in question are such as that they should be construed and resolved in favor of the city as against the defendants, under favor of the recent holding of the Supreme Court in the case of *Cleveland Ry. Co. v. City of Cleveland*, 97 O. S., 122, wherein it was held that,

"The Constitution of Ohio provides that all property shall be 'subservient to the public welfare.' By virtue thereof, where a private person or corporation enters into a contract with the public and such contract is of doubtful or uncertain meaning as to any of its provisions, that construction should be adopted that is most favorable and advantageous to the public interest and general welfare."

**ALLEGED NEGLIGENCE WHEREBY BARGES WERE DAMAGED
DURING HIGH WATER.**

Court of Appeals for Hamilton County.

EDWARD T. SLIDER V. THE WINIFREDE COAL CO.

Decided, May 19, 1919.

Action on Note and Account—Defendant Sets up a Counter-claim for Damages Based on Plaintiff's Negligence—Charge of Court with Reference to Right of Plaintiff to Recover—Good Faith in Setting up a Groundless Counter-claim.

1. In an action on a note and account to which a counter-claim has been set up based on damages suffered through the alleged negligence of the plaintiff, a claim of error on the part of the trial judge in so charging the jury as in effect to deny defendant relief on his cross-petition, unless the note and account sued on were first satisfied, becomes immaterial on review where the jury found that the plaintiff was free from negligence.
2. Good faith by a defendant in the setting up of a groundless counter-claim does not excuse failure on his part to perform the contract by which he is bound and which forms the basis of the suit in which the counter-claim is asserted.

Cobb, Howard & Bailey and Henry L. Rockel, for plaintiffs in error.

Stephens, Lincoln & Stephens, contra.

SHOHL, P. J.

Edward T. Slider entered into a written contract with the Winifrede Coal Company for his requirements of coal, estimated at 75 barges, for the year beginning April 1, 1916. Slider was to furnish his own barges and was to deliver them to the Winifrede Coal Company at Cincinnati, to be towed to the mines on the Kanawha River in West Virginia and there loaded, and returned to Cincinnati. Slider would then receive them and take them to Louisville. Delivery was to be in as nearly equal monthly installments as possible from April 1, 1916, to April 1, 1917, subject

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to river conditions. The parties entered upon the performance of the contract and for the first three months deliveries of coal were made. On July 16, 1916, the Winifrede Coal Company had five barges belonging to Slider, one of which was loaded, and the other four were empty. That night there was a rise in the river and a swift current. All the barges at the coal company's landing, including those of Slider and others, were swept down the river and lost or damaged. A controversy arose and a series of letters was interchanged, Slider claiming that the coal company was liable for the loss and damage to his barges, and the coal company denying liability on the ground that the loss was due to an unavoidable accident.

During the controversy the company held Slider's note for \$1,175 due August 11, 1916. He also owed them for other coal delivered under the contract and on an open account for towing and repairs. On August 10, 1916, Slider wrote stating:

"My note which you hold that is due tomorrow will not be paid until this controversy between you and I is settled."

He had previously sent an itemized bill for approximately \$3,200 which he claimed was part of his loss. He made clear his position that he would not pay for the coal that he had received under the contract until the Winifrede Coal Company would pay or allow his claim for damages for loss and injury to his barges. The coal company replied that unless he paid his note and account they would not deliver any more coal. Thereafter, the note went to protest and the Winifrede Coal Company brought suit, setting up the note, the amount due on the open account for coal and for towing and for repairs, and also claiming damages for breach of contract.

The defendant filed an answer and cross-petition admitting the indebtedness to the plaintiff in substantially the amount claimed, excepting the claim for damages for breach of contract and a few minor items of the account. The counter-claim consisted of two causes of action. First: damages to his barges in the flood and the expenses incident thereto; and, second, damages

for breach of contract for refusing to furnish coal after August 11th.

There was a jury trial, at the end of which the jury rendered a unanimous verdict for the plaintiff, the Winifrede Coal Company, in the sum of \$4,794, substantially the amount claimed, and finding:

“That there is nothing due to the defendant, Edward T. Slider, on the claim set forth in his cross-petition.”

Judgment was rendered in favor of the plaintiff and defendant prosecutes error. Error is predicated upon the charge of the court in several respects. The defendant contended that he did not commit a breach of contract by refusing to pay his note and refusing to pay for the other coal delivered, if at the time of such refusal he had a valid claim against the plaintiff for the loss of his barges. The court took the opposite view and refused to give defendant's special charge No. 2, which is as follows:—

“You are instructed that the omission or refusal of the defendant to pay his note for the sum of \$1,175.72 given to the plaintiff for barges of coal delivered under the contract in this case or to pay or give his note for other coal delivered under said contract was not a breach of the contract which would justify the plaintiff in refusing to make further deliveries thereunder, if you find that such omission or refusal was due to the fact that prior thereto, plaintiff negligently permitted certain of the defendant's barges to be lost and damaged while in plaintiff's possession and control for the purpose of being loaded by plaintiff with coal in the performance of the contract between the plaintiff and defendant for the sale and purchase of said coal; that by reason of such loss and damage, the plaintiff was then liable to the defendant in an amount in excess of the amount which defendant owed plaintiff under said contract; and that defendant notified plaintiff that his refusal or omission to pay for such previous deliveries was because of plaintiff's said liability to him, and that he would pay for any further deliveries of coal under said contract and would adjust and pay any difference that might be found to be owing by him for the previous deliveries when the matter of plaintiff's liability to him for the loss of and damage to said barges was adjusted, and that this was all done by the defendant in good faith.”

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Instead the court gave plaintiff's special charge No. 2, which is:—

“If the jury find that the defendant failed to pay at maturity his note for coal already delivered under the contract, and failed to pay for the other barges of coal which he had received, and indicated his intention to not pay therefor, according to the terms of the contract, until the plaintiff would pay or allow his claim against the plaintiff for the loss of his barges in the flood, then I charge you that under the contract the plaintiff had the right to refuse to make further deliveries of coal and is not liable for breach of contract by reason of such refusal.”

These rulings in substance denied defendant relief on his counter-claim, if he refused to pay his note and account, even though he may have had a valid claim against the plaintiff in an amount equal to such note and account. It is not necessary to pass upon the correctness of the court's position in this regard. The question of negligence of the plaintiff in caring for defendant's barges was left to the jury on the evidence under instructions that are not complained of, and the jury found that there never was any liability on the part of plaintiff for the loss of Slider's barges. Since it is now established that he had no valid claim, what his rights would have been had his claim been valid are immaterial. Even if the trial court was in error as to the rights of the parties in case the plaintiff was guilty of negligence in the care of defendant's barges, such error was not prejudicial to defendant because there was no negligence. *Contractors' & Builder's Supply Co. v. Alta Portland Cement Co.*, 4 C.C.(N.S.), 225, 230 (affirmed without report 72 O. S., 655).

The court also refused defendant's special charge No. 1 to the effect that if the defendant in good faith claimed that plaintiff was liable to him for loss and damage to the barges, and notified plaintiff that this was his reason for not paying, the omission or refusal to pay the note did not constitute a breach of contract which would justify plaintiff in refusing further deliveries. The assertion of a groundless counter-claim will not excuse a defendant from the performance of his obligation under a contract merely because the counter-claim is asserted in good faith. *Contractors' & Builders' Supply Co. v. Alta Portland Cement*

Co., 4 C.C.(N.S.), 225, 230; *Creswell Ranch & Cattle Co., v. Martindale*, 63 Fed., 84.

The contract contained the following stipulation:—

“The terms of payment being an essential part of this agreement, failure on the part of the purchaser to comply with the above terms shall give the Winifrede Coal Company the right, at its option to either cancel any unfilled part of this or any other order or contract for the sale of coal between the parties hereto, or to suspend shipments until the arrearages shall have been made good.”

Such stipulation was usual in contracts in the Sixth Federal Circuit since the decisions in the cases of *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed., 569, and *Monarch Cycle Co. v. Royer Wheel Co.*, 105 Fed., 324. In the absence of such a stipulation, the federal courts for this circuit held that the failure to pay for an installment unaccompanied by a renunciation of the agreement did not justify the seller in refusing to deliver, but held that the express provision of the contract changed the rights of the parties in this respect. Such a stipulation as that contained in the agreement under consideration is in substance an agreement that failure to pay for goods delivered shall constitute a material breach. But it is something more. It is a condition of the obligation of the seller to make deliveries. By its terms the seller is relieved from continuing to deliver goods when the buyer fails to make payment. *Southern Coal & Coke Co. v. Bowling Green Coal Co.*, 161 Ky., 477, 480; *Winchell v. Scott*, 114 N. Y., 640.

There is nothing in Section 8425 of the Code that prohibits such a stipulation. Indeed, its terms must be construed as giving it effect. The failure of Slider to comply with the contract was intentional and deliberate. It constituted a material breach of the agreement on the part of the defendant. See Williston on Sales, Section 467, page 810. The court, therefore, was right in refusing to submit to the jury the question of good faith of the defendant in making his contention. The judgment will be affirmed.

HAMILTON and CUSHING, JJ., concur.

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DEGREE OF CARE REQUIRED AT A RAILWAY CROSSING.

Court of Appeals for Richland County.

(Heard by Judges Powell, Houck and Farr, Judge Farr of the Seventh District sitting in the place of Judge Shields.)

THE BALTIMORE & OHIO RAILROAD COMPANY v. ANNA B.
KATELY.

Decided, February 17, 1919.

Action to Recover for Injury at Railroad Crossing—Duty of Locomotive Engineer Approaching Crossing with Train—Effect of Want of Knowledge as to Location of Crossing—Effect of Objects at Road-side Obstructing View but Not on Railroad Lands.

1. In an action to recover for personal injuries sustained in a collision between a railroad train and an automobile at a railroad crossing, the trial court instructed the jury as follows:

"The defendant had the right to run its train over said crossing at any speed consistent with safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration however all the circumstances surrounding that crossing affecting the traveling public and having a due regard for the safety of the public using the crossing."

Held—Error on Authority of Railroad Co. v. Kistler, 66 O. S., 341.

2. A traveler on a public highway approaching a railroad crossing is not excused from looking and listening for trains or the exercise of ordinary care, even though he is not aware of such crossing, if the railroad is obvious to anyone reasonably exercising his ordinary powers of observation.
3. It is error for a trial court to instruct the jury that in determining whether or not a plaintiff exercised ordinary care in approaching and going upon a crossing, that they might take into consideration the fact that the plaintiff was a stranger in that locality and was not familiar with the location and position of things and objects thereabout, if the railroad and the sign giving notice of such railroad are so obvious that a person in the exercise of ordinary care would observe the same.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, April 15, 1919.

4. In an action to recover for personal injuries sustained in a collision between an automobile and a train upon a railroad crossing, where there is testimony tending to show that trees, weeds, brush or other objects obstructed the view of such railroad, it is error for the trial court to refuse to charge that a railroad company has no control over the trees, weeds, brush and other objects not on its right of way or own land, although they may obstruct the view of its lines, and that a company is not required to take such things into consideration in approaching a crossing with one of its trains.

McBride & Wolfe, for plaintiff in error.

Brucker, Voegelé & Henkel, contra.

FARR, J.

The action in the court below was to recover for personal injuries sustained by the defendant in error at what is known as the Park avenue west crossing of the Baltimore & Ohio Railroad Company's lines by the Lincoln Highway, immediately west of the city of Mansfield, on or about the first day of May, A. D. 1917.

The amended petition alleges that on or about the above date, defendant in error was riding with her husband, Edward S. Kately, and their four-year-old child, in an automobile belonging to said husband, who was the driver thereof; that they were making a trip from their home in the city of Chicago, Illinois, to the city of New York, over the Lincoln Highway, and in the course of said journey eastward reached the crossing of said highway and railroad company's tracks, at what is known as Park avenue west near the city of Mansfield; that she was in the exercise of ordinary care, maintaining a lookout and observed a railroad crossing ahead, and seated in the front seat of said auto and when about thirty feet from said crossing, she looked both north and south; that the view to the south was obstructed by trees, underbrush and growth, and an embankment along the defendant's right-of-way, but that she continued to look until she reached said crossing; that she did not, in the exercise of ordinary care, see the train of the defendant company approaching; that at that time the automobile was being operated in a careful and proper manner, and was

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under the full control and management of the husband, and was being operated at a speed of not more than ten miles per hour; that there is a sharp curve in the line of said railroad a short distance south of said crossing, rendering the same dangerous and unsafe, all of which was unknown to plaintiff, but which was well known to defendant company, and that said company continued to maintain said crossing in such dangerous condition and to operate its trains over the same in a careless, negligent and wanton manner; that at the time of the accident and injury to plaintiff, defendant carelessly, negligently and wantonly operated a freight train on and over said crossing at not less than twenty-five miles per hour, without any signal by bell, whistle or otherwise; that there was no flagman or watchman at said crossing, and that the electric signal bell there maintained did not give any alarm or warning of the approach of said train; that the defendant company, through its servants and employes, in the exercise of ordinary care, could, or should have seen the dangerous position of plaintiff, but that it operated its said locomotive and cars wantonly and recklessly on to said crossing, without any decrease of speed, and without warning, striking said automobile, breaking and overturning the same and injuring plaintiff by pinning her underneath, by which she was severely cut, lacerated and bruised on and over her face and head, shoulders, back, chest, abdomen and limbs, injuring her nervous system, fracturing her right arm, permanently impairing its movement, fracturing the right clavicle, and resulting in numerous other injuries of a lasting and permanent character, for which damages are asked in a substantial sum.

To this amended petition an amended answer was filed, admitting in the first defense the non-essential allegations and tendering a general denial.

As a second and alternative defense it is averred that if the defendant, its officers, agents or employees, were negligent, that through neglect and want of care, the said Anna B. Kately at the time contributed to whatever injury she received by not looking or listening for the approaching train, and in not call-

ing the attention of the driver to said crossing or train, and was negligent in the manner in which she attempted to cross defendant's tracks, and that she took no precaution in looking to her own safety.

To this answer a reply, making, in substance, a general denial was filed, and the issues then being joined, trial to jury was had, which resulted in a verdict and judgment for plaintiff, from which error is prosecuted in this court.

There are a number of assignments for error to the admission and rejection of testimony, all of which have been carefully examined and which it is not necessary to discuss here in detail; it is, therefore, sufficient to say that no error sufficiently prejudicial to the substantial rights of the plaintiff in error is disclosed which would authorize or warrant a reversal of the judgment.

A number of assignments for error are urged to the charge of the trial court to the jury, and the first is as follows:

"In the use of the crossing their rights are co-ordinate and equal; reasonable care and prudence must be used and exercised by each in the use of same; each must use his own right to cross that he shall not unreasonably interfere with the rights of others to pass over, having in view the nature, necessities of the method of locomotion and power of control of the locomotion peculiar to each. Both are bound to exercise such prudence as an ordinarily prudent person would exercise under the same or similar circumstances."

In the case of *Railroad Co. v Kistler*, 66 O. S. 335, Burket, J., in discussing the charge of the court, criticizes the following:

"The jury are instructed that the defendant railroad company had, at the time of the collision complained of, the same right to use that portion of the public highway over which its track passed at the point of collision that the public had. Its rights and those of the plaintiff were mutual and reciprocal, and the railroad company and the plaintiff were bound to have due regard each for the safety of the other."

And then observes as follows:

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“This charge was too strongly in her favor. While in law she had the same right to use the crossing that the railroad company had, the different modes of such use constitute a difference in right. As she could stop with her team within a few feet, and the train could not stop short of many rods, it follows of necessity that when both were approaching the crossing at the same time, the train had the right of way, and it was her duty to stop and let the train pass before attempting to cross. Commentaries on Law of Negligence by Thompson, Section 1611. *Continental Improvement Company v. Stead*, 95 U. S., 161, 163. Such would be the conduct of all men of ordinary care under such circumstances. To rush ahead and attempt to pass, knowing the train to be close at hand, is not the conduct of ordinarily prudent persons, but is gross negligence.”

The above instruction as given in the instant case is subject to criticism when compared with the principle announced in the above case of *Railroad Co. v. Kistler*; however, since the court adds:

“Having in view the nature, necessities of locomotion and power of control of the locomotion peculiar to each, both are bound to exercise such prudence as an ordinarily prudent person would exercise under the same or similar circumstances—” the instruction is not considered sufficiently erroneous to authorize a reversal, in view of that which follows on that subject. However, it would have been far preferable for the court to have followed the course so clearly indicated in the above case. It is indeed a serious question whether the jury sufficiently comprehended what is here permitted to become the “saving clause” of the instruction. The danger was that the jury might conceive that it was just as much the duty of the defendant to stop its train as for the auto to stop until the train would pass; however, the doubt will be resolved in favor of a presumption that the jury properly understood the instruction.

The court further instructed the jury that it would be negligence for the railroad company to permit or suffer shrubbery, trees or embankments to exist on its right-of-way, so as to materially obstruct the view of the track or approaching trains by persons about to cross the track at a public crossing

The jury should have been instructed that such trees, shrubbery and embankments, if upon the right-of-way, might be considered by them as a circumstance in determining whether or not the company was guilty of negligence in approaching the crossing at the rate of speed and in the manner in which it approached the same with its train in the instant case.

The charge on the subject of wanton negligence is objected to, but it fairly states the law, and is not therefore objectionable.

Plaintiff's third request to charge is criticised because it is claimed that it prescribes a rule of conduct for one approaching a crossing, but does nothing more; that is, Mrs. Kately may have been ever so careful in her approach, but extremely negligent in going upon the crossing before a rapidly approaching train. If she was negligent in going upon the crossing in front of such train, believing that she could cross in safety, and the engineer, after seeing her, was negligent in not lessening the speed or stopping his train, believing that she would cross in safety, then the proximate cause of the injury was the miscalculation and negligence of both, and there could be no recovery, unless the engineer after he saw and realized her danger had time to slacken the speed or stop his train and prevent the injury; however the request, while incomplete, is not substantially prejudicial.

Again, objection is urged to that part of the charge which reads as follows:

"The defendant had the right to run its train over said crossing at any speed consistent with safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration however all the circumstances surrounding that crossing, affecting the traveling public and having a due regard for the safety of the public using the crossing."

It is contended that this instruction makes it the paramount duty of the engineer to safeguard persons and property upon the crossing, while it is declared as the law in the Kistler case that his first duty is to take proper care for the persons and property in his charge. The above instruction given in the in-

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stant case is practically *verbatim* with the one criticised and held to be erroneous in above case of *Railroad Co. v. Kistler*, 66 O. S., 341, as follows:

“ ‘The defendant had the right to run the train at the time and place of this collision at any speed consistent with the safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all the circumstances surrounding that crossing, affecting the traveling public and having a due regard for the safety of the public using the crossing.’

“ ‘From what has already been said as to the speed of trains, it will readily be seen that the latter part of this charge, all after word ‘manner,’ is erroneous.’ ”

Therefore, measured by the rule fixed in the *Kistler* case, the foregoing instruction in the instant case was absolutely erroneous and prejudicial because it imposes a higher duty upon the defendant company than is required by law.

Again, error is predicated upon plaintiff's seventh request given before argument, and found at page 151. It reads as follows:

“7th: In determining whether or not the plaintiff exercised ordinary care in approaching and going on to said crossing, you may take into consideration the fact that the plaintiff was a stranger in that locality and was not familiar with the location and position of things and objects thereabout.”

The foregoing is obviously erroneous, because whether a stranger or not, and whether familiar with the crossing or not, still the plaintiff was bound to exercise ordinary care for her own safety. The fact that her husband was driving the auto did not excuse her from making reasonable and prudent effort to see for herself that the crossing was safe.

Hoag v. Ry. Co., 111 N. Y., 199; *Brickel v. Ry. Co.*, 120 N. Y., 290; *Bronner v. R. R. Co.*, 179 Fed., 577, 3 syl. Here was a large sign, on the bank near by on plaintiff's side of the road. “*Danger, Rail Road Crossing 500 Feet*,” and the white cross arms at the crossing in the distance. If she could

see these warnings—and she certainly could had she looked—and did not see them, she is chargeable with knowledge just the same. *R. R. Co. v. O'Riles*, 65 O. S., 458; *Ry. Co. v. Swart-out*, 14 C. C., 582; *R. R. Co. v. Dump, Admx.*, 21 C.C.(N.S.), 300.

In the case of *Allen v. Ry. Co.*, 105 Mass., 77, Morton, J., at page 79, observes as follows:

“The fact that the plaintiff did not know that there was a railroad there is no admissible excuse, because it is obvious that any man who had his sight, and used it must have seen that he was approaching a railroad crossing. If the plaintiff did not see it, it shows conclusively that he was not using the circumspection and care which every prudent man does and is required to use in traveling. It is absurd to suppose that a traveler using ordinary care could, in the daytime and with nothing to interfere with his vision, get upon this railroad crossing without seeing it.”

And again, in *Herandt v. Ry. Co.*, 78 N. J. L., 190, 4th syllabus, it is held:

“A traveler on the highway approaching a railroad crossing is not relieved from the responsibility of looking and listening for trains by reason of his ignorance of the existence of such crossing, if the presence of the railroad is obvious to any one reasonably using his ordinary powers of observation.”

Therefore the plaintiff though a stranger, was bound to exercise ordinary care for her own welfare, and the jury might well have understood that a less degree of care was required of plaintiff, because she was a stranger and if a less degree, how much less? The danger of the instruction becomes readily apparent; it was therefore erroneous and prejudicial. Some other objections were made to the charge which it is not considered necessary here to discuss, nor the question of “joint enterprise.” Neither will any opinion be expressed at this time on the weight of evidence, which issue was not pressed in argument.

The last assignment of error which it is considered necessary to discuss here is the refusal of the trial court to give the defendant's first request to charge. It reads as follows:

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“As a railroad company has no control over the trees, weeds, brush, shrubbery and the like not on its right-of-way, it is not required to take such things into consideration when approaching a crossing.”

The foregoing is assuredly the law of Ohio as announced in *Railroad Co. v. Kistler*, 7th paragraph of the syllabus, which reads as follows:

“As a railroad company has no control over the trees, weeds, brush, shrubbery and the like, not on its right-of-way, it is not required to take such things into consideration when approaching a crossing.”

Why the foregoing was not given is not apparent. However, it was not, and its refusal was prejudicial error in view of the testimony disclosed by the record.

It follows, therefore, that the judgment must be reversed for error in the charge of the court below, and it is so ordered.

POWELL and HOUCK, JJ., concur.

TAXABILITY OF MONEY ON DEPOSIT IN ANOTHER STATE.

Court of Appeals for Cuyahoga County.

Judges Jones, Gorman and Hamilton of the First District sitting
in place of the judges of the Eighth District.

THE CLEVELAND & WESTERN COAL COMPANY V. O'BRIEN,
TREASURER.*

Decided, July 2, 1917.

Taxation—Money Belonging to an Ohio Corporation Deposited in Another State—Such Funds are Credits With Their Situs in Ohio and Subject to Taxation in Ohio.

1. Ordinarily money deposited in bank to credit of a corporation or individual and subject to check by the depositor creates the relation of debtor and creditor between the bank and the depositor, and moneys deposited in a bank subject to check are credits or intangible property.
2. It is proper for the Legislature to provide what things shall be money and what shall not be money for the purpose of taxation.
3. Section 5326, General Code, does not provide that deposits in a bank subject to be withdrawn in money on demand by a depositor are tangible property.
4. All credits have their situs at the residence of the owner, and not at the place where the credit is carried on the books held by the person entitled to hold the credits.
5. Moneys of an Ohio corporation deposited in a bank in another state, and subject to be withdrawn on demand, are to be considered for the purposes of taxation as money; but nevertheless are intangible property and have their situs for the purposes of taxation at the place of the principal office of the company in Ohio.
6. Section 5406-3, General Code, has no application to property located outside the state of Ohio, and does not affect moneys and credits held outside of the state, but belonging to individuals or corporations in the state.

Appeal to the Court of Appeals for Cuyahoga County.
Error to the Court of Appeals for Cuyahoga County.

*Affirmed by the Supreme Court, 98 Ohio State, 14.

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C. F. Taplin, for the coal company.

Samuel Doerfler, Prosecuting Attorney, and *T. S. Dunlap*, Assistant Prosecuting Attorney, for O'Brien, county treasurer.

GORMAN, J.

Judgment was rendered in favor of the treasurer of Cuyahoga county in the court below. A demurrer to the petition was sustained in the court of common pleas, and the matter comes up both on error and appeal to this court.

The plaintiff, a corporation under the laws of Ohio, filed its petition in the common pleas court of Cuyahoga county, setting out that it is a corporation organized under the laws of Ohio and having its principal place of business in the city of Cleveland in said county, and that the defendant was the duly elected, qualified and acting treasurer of the county of Cuyahoga and state of Ohio. Plaintiff says that in its business of buying and selling coal it has acquired and operated a dock in the city of Milwaukee, county of Milwaukee and state of Wisconsin; that said dock is operated as a distinct department of the plaintiff's business and that all dealings connected therewith are kept separate and distinct from the other business of the plaintiff; that all coal put upon said dock by the plaintiff is charged up to said dock as though it were a separate entity from the plaintiff and that its operating costs and all expenses in connection with its operation are kept separately, regular books being kept to cover all purchases and sales in connection therewith, said books being kept in the Milwaukee office; that all remittances to the plaintiff arising from the sale of dock coal are made to the Milwaukee office, endorsed by the manager of said office, and deposited to the credit of the plaintiff in the account carried in the First National Bank of the city of Milwaukee; and that said dock business has its own profit and loss account and in every way is operated as a distinct and separate business transacted by the plaintiff in the city of Milwaukee, Wisconsin. The plaintiff further says that it duly made and filed its tax return with the proper authorities of Cuyahoga county, Ohio, covering the property owned and held by it, on the day preceding the second Monday in April,

1916, which according to the statute it should list in Cuyahoga county; that the statement accompanying the tax return so filed by plaintiff showed that the plaintiff had on deposit in the First National Bank of Milwaukee, Wisconsin, on said tax-listing day the sum of \$43,850.98; and that the auditor of Cuyahoga county, without the consent and over the protest of plaintiff has placed said sum of money on the duplicate as being taxable property of the plaintiff in Cuyahoga county, and the defendant herein, as treasurer of Cuyahoga county, has entered upon his books as due from plaintiff by way of tax on said sum of money the sum of \$681.86, which sum he threatens to and will collect of this plaintiff unless he is enjoined from doing so. Plaintiff further says that under and by virtue of Sections 5404 and 5406-3, General Code of Ohio, the county auditor is without right or authority to list as the property of this plaintiff as taxable in Cuyahoga county said sum of \$43,850.98 on deposit in Milwaukee on tax-listing day, and the county treasurer is without right or authority to assess or collect any tax thereon. The petition further avers that said officers maintain that said bank deposit is taxable under Section 5328, General Code of Ohio, but plaintiff avers that said section of the code is not applicable to the Milwaukee deposit, and plaintiff says further, that, if said section should be held applicable, it is unconstitutional and void, being contrary to the provisions of the Ohio and Federal Constitutions and amendments thereto. Plaintiff further says that it has tendered to the defendant the sum of \$723.39, being the amount of tax lawfully and admittedly due from this plaintiff on the property returned by it, and upon which it is lawfully liable to be taxed, but that the defendant herein has refused to accept said sum, claiming that the plaintiff should pay said additional sum of \$681.86, the tax assessed upon the Milwaukee bank deposit, which amount of tax plaintiff claims is assessed without right or legal authority. Plaintiff further says that it is now able, ready and willing and now offers to pay, said amount of \$723.39, or any other sum that may be claimed as the tax lawfully due on the property returned for taxation of the value of \$46,520. It prays for a temporary restraining

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order enjoining the defendant as treasurer of the county of Cuyahoga, state of Ohio, from enforcing the collection from it of said tax on said Milwaukee bank deposit, and from adding any penalty thereto; and that upon a final hearing said order may be made permanent, and for such other and further relief as plaintiff is in equity entitled to.

As before stated, the demurrer to this petition was sustained by the common pleas court, and the plaintiff not desiring to plead further the plaintiff's petition was dismissed, and it was "considered that the defendant go hence without day and recover of the plaintiff his costs," to all of which the plaintiff excepted, and appealed the case to this court.

It is immaterial whether the question raised be decided upon appeal or error proceedings, inasmuch as there are no facts stated in the record to be considered by the court except those pleaded in the petition.

The question to be determined is whether or not the money of the plaintiff company deposited at Milwaukee is subject to taxation in Cuyahoga county, Ohio. We are of the opinion that it is subject to taxation and that the court of common pleas did not err in sustaining the demurrer to the petition.

Ordinarily money deposited in a bank to the credit of a corporation or individual and subject to check by the depositor creates the relation of debtor and creditor between the bank and the depositor, and moneys deposited in a bank subject to check are credits of intangible property. By the provisions of Section 5326, General Code, the term "money" or "moneys" for the purposes of taxation, "includes any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand."

Now it is perfectly proper and legitimate for the Legislature to provide by legislation what things shall be money and what shall not be money for the purpose of taxation, but it will be noted that this Section 5326 does not provide that deposits in a

bank subject to be withdrawn in money on demand by a depositor are tangible property. It needs no citation of authorities to support the proposition that all intangible properties—credits—have their situs at the residence of the owner, and not at the place where the credit is carried on the books held by the person entitled to hold the credits.

Notwithstanding the fact that for the purposes of taxation these funds of the plaintiff at Milwaukee are to be considered as money, they nevertheless are intangible property, and have their situs in Cleveland, the residence of the plaintiff company. Every corporation in Ohio for the purpose of taxation is as much a person as an individual person, and its residence is fixed by statute as the place where its principal office is located in the state.

Under the provisions of Section 5328, General Code, "All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

It is not claimed in this case that the moneys on deposit in Milwaukee are exempt by virtue of any law in Ohio which exempts them. The claim made by council for plaintiff is that under Section 5404, General Code, a corporation is required to list for taxation moneys and credits of the corporation within the state at the true value in money. This Section 5404 is found in Chapter 4 of Title I, Part Second, relating to taxation, and it prescribes the method whereby the officers of a corporation shall make their returns for taxation to the proper officer of the county. In substance it provides:

"The president, secretary, and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the

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oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money."

The construction to be placed on this section we think is that all real estate and all personal property, all moneys and all credits belonging to a corporation within the state of Ohio, shall be listed for taxation at their true money value. Of course tangible property located outside of the state of Ohio can not be taxed in the state of Ohio; but intangible properties, such as credits and moneys on deposit in a bank located outside of the state and owned by individuals or corporations in this state, we hold have their situs in the state at the place of residence of the owner, and are to be there taxed.

It would be inequitable and unjust to hold in a case like this that a corporation which has money on deposit outside of the state will not be liable to list this money for taxation, where as an individual similarly situated—in the state and having money on deposit outside the state—would be required to list this money for taxation. It is immaterial what this money may be called, whether it be designated money or a credit, it belongs to the plaintiff corporation, and is subject to the order of the plaintiff corporation, and is intangible in its nature by reason of the fact that the moneys deposited in a bank are not kept separate and apart, in trust for the depositor, but these deposits constitute between the bank and its depositor the relation of debtor and creditor and make these deposits a credit, even though the legislature itself for the purpose of taxation classifies moneys in bank subject to be withdrawn as "money."

It is urged that Section 5406-3, General Code (106 O. L., 249), throws some light upon the question under consideration. That section provides:

"In determining the location of property for the purpose of the two preceding sections (that is, for the purpose of listing the same for taxation) all moneys and credits used in or appertaining especially to a separate business transacted by an incorporated company at a particular place, shall be deemed to be located at

such place where the business is transacted, and moneys and credits not used in or appertaining especially to such separate business transacted at any particular place shall be deemed to be located at the principal place of business of such company."

This statute was enacted for the benefit of the state of Ohio, and the various counties, in order that the various towns, municipalities and other subdivisions of the state might have the benefit of receiving the taxes from property located in the subdivisions of the state. And this rule was made to apply to moneys and credits as well as to tangible property. But this section would have no application to property located outside of the state of Ohio, and was never intended to affect moneys and credits, held outside of the state of Ohio, but belonging to individuals or corporations in the state of Ohio, as will be apparent by a reference to the two preceding sections, 5406-1 and 5406-2, General Code.

For the reasons stated the demurrer will be sustained, and a decree may be entered in favor of the defendant.

The error proceedings will be dismissed.

Judgment for defendant.

Petition in error dismissed.

JONES, P. J., and HAMILTON J., concur.

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COPYWRITING A DESIGN DOES NOT SECURE MONOPOLY RIGHTS.

Court of Appeals for Hamilton County.

LOUIS BUOB AND THEODORE SCHEU, A PARTNERSHIP UNDER THE FIRM NAME OF BUOB & SCHEU, v. THE BROWN CARRIAGE COMPANY, THE WHEEL TOP & HARDWARE COMPANY, W. W. BUOB, MANAGER OF THE WHEEL TOP & HARDWARE COMPANY, AND SPLIT HICKORY AND WHEEL TOP COMPANY.

Decided, June 23, 1919.

Unfair Competition—Adoption by a Competitor of Similar Methods—Not Barred by Copyright—Directions to a Purchaser as to how Measurements should be Made—Not the Palming off of Goods as Those of Another.

1. A manufacturer of unpatented articles who has devised a method of making measurements and who has copyrighted a catalogue, circular or advertisement containing a diagram giving instructions to prospective customers as to the manner of taking such measurements, does not thereby acquire the exclusive right to use the methods set forth in the copyrighted publication.
2. In an action for unfair competition, one using such method will not be enjoined in the absence of allegations that he was passing off or attempting to pass off on the public his goods or business as the goods or business of the plaintiff.

Galvin & Bauer, attorneys for plaintiffs.

Froome Morris, attorney for defendants.

SHOHL, P. J.

This case is heard on appeal and is submitted on demurrer to the petition.

The plaintiffs are manufacturers of buggy tops, automobile tops and automobile supplies and the defendants are carrying on a similar business. Plaintiffs allege that in the conduct of

their business, they devised, invented and prepared a certain method or form for a quick and accurate measurement of an auto top cover, and caused a drawing thereof to be registered for copyright; they have also invented, prepared and devised a drawing known as "Auto Top Cover-Touring Car" and have registered the same in the registry of copyrights of the United States; they have also prepared a drawing known as an "order chart," likewise registered and copyrighted; they have expended large sums of money in the development of the designs and drawings, and by reason thereof they have acquired quite a reputation among owners, dealers and repairers of automobiles throughout the United States, Canada and Europe, resulting in large profits. The petition alleges that the defendants are competitors of plaintiffs, and did copy and appropriate the said devices and drawings, and have issued advertising matter containing cuts and drawings which are similar and flagrant imitation of those of plaintiffs, copies of which are attached to the petition as exhibits; defendants have sold and are selling large quantities of goods and merchandise by the use of said device, which it is alleged constitutes an infringement of plaintiff's trade-marks and copyrighted cuts, to plaintiff's great damage; defendants have diverted from the plaintiffs large sources of revenue, which they would otherwise have obtained. Irreparable damage is alleged.

It is admitted that in so far as any action relating to right under the copyright laws of the United States is concerned, the federal courts have exclusive jurisdiction. See 9 Cyc., 960. The basis of this action is said to be unfair competition.

Unfair competition, in its essence, consists in passing off, or attempting to pass off, on the public, the goods or business of one person as the goods or business of another. 28 A. & E. Encyc., 2nd Ed., 409; 38 Cyc., 780; *Lippman v. Martin*, 5 O.N. P., 120; *Safe-Cabinet Co. v. The Globe Wernicke Co.*, 19 C.C.(N. S.), 31—3 App., 24, modified and affirmed, 92 O. S., 532; *Drake v. Glessner*, 68 O. S., 337; *French Bros. Dairy Co. v. Giacini*, 12 O. C. C. (N.S.), 134. Affirmed 84 O. S., 483.

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In the case at bar it is not charged that there was anything done which would enable the public to confuse the goods of the plaintiffs with those of the defendants. The design is not used by plaintiffs to identify the goods as those of plaintiffs' manufacture. The real matter of complaint is not that defendants have copied plaintiffs' design, but that the defendants in the effort to sell their goods have adopted the same method pursued by plaintiffs to carry out their sales, and to enable purchasers to specify with particularity the goods which they desire. The similarity is one of method. The article which plaintiffs sell is not patented. They have no monopoly in the manufacture of auto tops. The principle involved is well stated by Lacombe, J., in the case of the *National Cloak & Suit Co. v. Standard Mail Order Co.*, 191 Fed., 528, as follows:

"I am entirely in accord with defendant in the proposition that a manufacturer of unpatented articles can not practically monopolize their sale by copyrighting a catalogue containing illustrations of them. From a comparison of the illustrations upon which complainant relies, the fair inference would seem to be that defendant makes some garments which are identical with complainant's and offers them for sale. If this be so, he can not be deprived of the right to issue a catalogue of the garments he offers, with illustrations showing what they look like, provided that his illustrations are drawn from garments themselves, and not copied from complainant's copyrighted catalogue."

In the case of the *S. S. White Dental Co. v. Sibley*, 38 Fed., 751, plaintiff's assignor devised and copyrighted a chart showing illustrated sections of teeth in connection with numbers, so arranged as to convey information respecting their character, size and shape and having thereon certain auxiliary lines and figures. This conveyed information that could not be obtained by any old method of illustration. Defendant made a similar chart in which his teeth were illustrated in the same manner as complainant's. It was held that the plaintiff's copyright did not cover the plan or arrangement shown by the chart and entitled him to no relief.

In *Burk v. Burial Association*, 3 U. S. District Court, Hawaii, 388, complainant, who had devised a plan and scheme for a burial association and had copyrighted the book setting forth his plan, was held not entitled to the exclusive right to use the methods set forth in the copyrighted publication. The decision follows the leading case of *Baker v. Selden*, 101 U. S., 99, where the distinction is made between patent rights and the rights of a person securing a copyright. The copyright gives no ownership in the process described in the book, but gives the owner the exclusive right to multiply and dispose of copies. See also *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed., 401, 411; *Ehret v. Pierce*, 10 Fed., 553.

The law encourages competition and the up to date merchant is bound to advertise his goods in such a manner that the public can buy them. If he shows a picture of his goods in an advertisement or circular, he can not prevent others from doing the same with their goods. If he makes clothes for men or women, he has a right to show them by diagram how they can order their clothes so they will fit. The giving of directions to a purchaser how to make his measurements before stating the size automobile top he wishes, does not constitute palming off of his goods as those of another merely because he uses the same method in having the automobile measured.

The allegations of the petition do not state a cause of unfair competition and the demurrer is sustained.

HAMILTON, J., concurs. CUSHING J., not participating.

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Muskingum County.

**POWER OF APPOINTMENT UNDER A MUNICIPAL
CHARTER.**

Court of Appeals for Muskingum County.

**THE STATE OF OHIO, EX REL SILAS W. BRADSHAW, V. WALTER
R. CULBERTSON.**

Decided, September Term, 1918.

*Charter Cities—Creation of Municipal Courts Therein—Authority to
Appoint a Municipal Court Clerk—Constitutional and Statutory
Courts.*

Where a city charter, supplemented by an act of the General Assembly, creates and constitutes a municipal court, such court is not a constitutional but rather a statutory court, and authority to appoint its clerk is vested in such appointing officer or board as is prescribed by the city charter, and not in the appointing officer or board prescribed by the supplementary statute.

POWELL, J.

This is an action in quo warranto originally commenced in this court to determine the right to the office of clerk of the municipal court of the city of Zanesville, this county.

The said city of Zanesville adopted a charter for its local self government under the provisions of the amended constitution of the state of Ohio, making provision for that purpose. Among other things this charter so adopted provides a municipal court for said city and creates the offices of judge and clerk of said court. It also prescribes a method by which such officers shall be selected. The relator, Bradshaw, claims to be entitled to the office of clerk by selection under the method provided by said city charter.

The defendant, Culbertson, also claims title to said office but upon different grounds from the claim made by the said relator. His claim is that the municipal court of the said city of Zanesville does not derive its existence or its authority from the char-

ter of said city so adopted, but from an act of the Legislature providing for a municipal court for said city, passed March 21, 1917, after said city charter had been adopted. This act upon which said defendant relies provides that a clerk of said court shall be chosen, but does not prescribe the method.

Defendant was appointed as clerk of said court by the judge thereof, duly elected and qualified in accordance with the provisions of said charter and said act of the General Assembly. The relator was appointed as such clerk by the Mavor of said City of Zanesville pursuant to the authority given him for that purpose by the charter of said city, and he was selected from the eligible list of candidates provided for said city under its civil service regulations.

No question is made by either plaintiff or defendant as to the form or manner of either of said appointments. Both seem to have been regularly made under the claim as made by each of said claimants and pursuant to the right to make such appointment as claimed by them respectively. If the municipal court of Zanesville is a charter court, deriving its existence and authority from the city charter so adopted, then the relator's appointment as such clerk being regular under the provisions of said charter, he would be entitled to exercise the duties and receive the emoluments of such office. But if said court is a legislative or constitutional court and derives its existence and authority solely from the Constitution and the act of the General Assembly creating such court with inherent power to select its own clerk, then the claim of defendant to be entitled to said office is good since such appointment was regularly made under this construction of the power and authority of said municipal court.

The charter of said city was adopted by a vote of the electors of said city in November, 1915. Such charter is authorized by Article XVIII of the Constitution of the State of Ohio as it now exists. By this article of the state Constitution:

“Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local, police, sanitary and other similar regulations as

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are not in conflict with the general laws." Section 3, Article XVIII.

This provision of the Constitution would seem to authorize the establishment of a charter court with authority and jurisdiction limited to the exercise of the "powers of local self government," and if such court is created solely by the charter of said city then the provisions of such charter ought to prevail as against a later act of the General Assembly in conflict with the same.

In case of a conflict between two acts of the General Assembly on the same subject matter, the provisions of the later act prevail as being a later expression of the legislative intent; but in a conflict between a municipal charter legally adopted and an act of the General Assembly on any subject provided for in said charter, the provisions of the charter ought to prevail within the territorial limits of the municipality on all matters within its authority and jurisdiction. Such act may be supplementary to and amendatory of such city charter and construed with the charter form a complete scheme for the exercise of judicial functions within the limits of said city.

We are of the opinion that such should be the rule of construction in cases of this kind. The authority and jurisdiction of the municipality charter should first prevail, then the legislative act creating a municipal court so far as the same is not in conflict with said charter should supplement and complete the judicial scheme in so far as its provisions are in harmony with the charter provisions. In case of conflict the charter provisions should always prevail as being the organic law relating to the government of said city, adopted by the residents thereof.

Applying these rules to the case in hearing, we find that the city of Zanesville has by its charter supplemented by the act of the General Assembly of March 21, 1918 (107 O. L., 722), a complete scheme for the administration of the judicial functions so far as may be necessary to enforce and carry out the local self government of the city; that such scheme creates and constitutes a municipal court for said city within the authority of said Section 18 of the Constitution; and that the charter of said city

creates the office of clerk of said court and provides a method by which such office may be filled; that such municipal court is not a constitutional court authorized by the Constitution itself and is without inherent power to appoint its own clerk, but has only such power and such authority as are expressly given it by the act of the General Assembly creating or attempting to create such municipal court, or such authority as is necessarily implied in order to carry out the purpose for which such charter was adopted and such municipal court created.

We think that the relator, Bradshaw, was regularly appointed by the proper appointing authority of said city, and that he has the right and title to the office of clerk of said municipal court, and that the defendant, Culbertson, is without any right or title to said office, and so finding and holding, judgment may be entered in favor of the said relator and against the said defendant.

Judgment accordingly.

HOUCK and SHIELDS, JJ., concur.

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Hamilton County.

ASSESSMENTS ACCORDING TO BENEFITS.

Court of Appeals for Hamilton County.

WILHELMINA CORMANY, ET AL. PLAINTIFFS, V. THE CITY OF CINCINNATI ET AL, DEFENDANTS.

LOUISA M. WEIMER ET AL, PLAINTIFFS, V. THE CITY OF CINCINNATI ET AL, DEFENDANTS.

ANNA YOUNG ET AL, PLAINTIFFS, V. THE CITY OF CINCINNATI ET AL, DEFENDANTS.

Decided, March 24, 1919.

Streets—Improvement of under the Benefit Plan—Exact Equality in the Matter of Assessment Not Always Attainable—Courts will Not Interfere unless Benefits are Substantially Exceeded.

1. Where the evidence as to the necessity of a street improvement is conflicting and fails to show an abuse of discretion on the part of council in ordering the improvement, a court will conclude the improvement was necessary.
2. An assessment according to benefits, which has been in all respects regularly made and was the cause of no complaint from abutting owners until after it was laid and had become payable, will not be enjoined where the evidence goes no further than to suggest that the special benefits may have been somewhat exceeded.

E. F. Alexander, and Walter C. Muhlhauser, for Plaintiffs.
Saul Zielonka, City Solicitor, and Frank K. Bowman, Assistant City Solicitor, contra.

HAMILTON, J.

These actions were brought by plaintiffs seeking to enjoin the collection of special assessments for street improvements on Spring Grove avenue, McLean avenue and Division street. The claim is made by plaintiffs that the improvements were of no special benefit to plaintiff's abutting property, and that the assessments were greatly in excess of any special benefits conferred.

The improvements consisted of repaving the streets with granite blocks, together with the necessary curbs, gutters and drains. Twenty-five per cent of the whole cost of the improvement, less the cost of intersections, was assessed against the abutting property on Spring Grove avenue and McLean avenue; and thirty-three and one-third per cent. of the whole cost, less the cost of intersections, was assessed against the abutting property on Division street.

It will be noted that the three streets were improved under separate proceedings of the city council, and separate suits were brought to enjoin the collection of the assessments, which suits were heard together in this court. The question presented is one of fact as to whether or not the assessments *substantially exceed* the benefits conferred. We say *substantially exceed* for the reason that exact equality of taxation is not always attainable and for that reason the excess of the cost over specific benefits, unless it be of a *material character*, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of special assessments. *Walsh v. Barron, Treas.*, 61 O. S., 15; *Norwood v. Baker*, 172 U. S., 269.

The undisputed evidence is that the streets improved were wide, busy thoroughfares, with heavy traffic, and the abutting properties were in the main substantial dwellings and business properties; that Spring Grove and McLean avenues prior to the improvements were paved with brick, which brick paving had been in use somewhat in excess of fifteen years; that Division street was prior to the improvement paved with boulders, which had been in use for about twenty years.

Plaintiffs' evidence was to the effect that the streets were in good or fair condition prior to the improvements and that the improvements were unnecessary. The evidence of the city tended to show the streets to have been badly worn; full of pot holes; and required constant repairs, entailing large expenditures of money, without material, beneficial results. Council, however, determined the improvements to be necessary and the evidence fails to clearly show an abuse of discretion on the part

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of council in ordering the improvements. We must, therefore, conclude that the improvements were necessary and consider the case from that view point. *McMaken v. Hays et al*, 10 C.C. (N.S.), 38, affirmed in 78 O. S., 412.

Plaintiffs' witnesses testified that without exception no benefit whatever accrued to any of the abutting property from the improvements and in some instances damage resulted.

The evidence of the city, given in the main by expert real estate brokers and dealers, was that the property was specially benefited by the improvements to the amount of five dollars per front foot on the basis of lots 100 feet in depth. This amount named was considerably in excess of the assessment.

It is difficult indeed for the court to reconcile the evidence in the case. It would be contrary to all human experience to conclude that such an improvement would have no beneficial result whatever to abutting property. Such improvements always tend to specially benefit property in the immediate vicinity of the improvement and is bound to enhance the value of the abutting property as a whole. On the other hand, it would seem that the amount of special benefit fixed by witnesses for the city, to-wit: the sum of five dollars per front foot, is necessarily an arbitrary amount on which to base calculation of benefits. Under this state of the evidence, we are unable to find the assessments to be *substantially in excess* of the benefits conferred. While the evidence may justify the view that the assessments somewhat exceed the special benefits conferred, it is not clear that they are sufficiently in excess of the special benefits as to warrant interference by the court under the rule of law applicable to the case. The following cases are in point:—

“When the power to tax in any particular case is challenged, the citizen has the right to be heard in court as to the legality of the tax, but when the power to tax is conceded and the complaint is only as to the valuation, a valuation made in good faith and according to the best judgment of the taxing officer will not be disturbed by the courts in the absence of *gross mistake*.” *Haggerty et al v. Huddleston, Hubbard & Co.*, 60 O. S., 149, at page 166.

"Where an assessment, according to benefits for a street improvement has been in all respects duly and regularly made, and all the proceedings are complete, and no complaint is made by property owners until an action is commenced to enjoin the collection of such assessment on the ground that it exceeds the benefits, the court will not grant such relief, unless the action of the council or other municipal authorities has been fraudulent or tantamount to fraud or the assessment is so excessive as to clearly and unquestionably exceed the special benefits to said property.

"In such cases the court does not sit as a court of appeal to review the action of the municipal authorities and make a new assessment, upon the evidence, according to its judgment." *Price et al v. City of Toledo et al*, 4 C.C.(N.S.), syl. 2 and 3, page 57.

"There is no jurisdiction in a court of equity to reduce a sewer assessment which is not *grossly excessive*." *King v. City of Dayton*, 10 C.C.(N.S.), 522.

Also see *Prentice et al, v. City of Toledo*, 11 C.C.(N.S.), 299, where the court say in the second paragraph of the syllabus:—

"The potential as well as the present use of property is to be taken into account in making assessments for public improvements."

It not being clearly shown by the evidence that the special assessments *substantially exceed* the benefits conferred, the injunction will be denied.

SHOHL, P. J. and CUSHING, J., concur.

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Richland County.

**STREET CAR PASSENGER THROWN AND INJURED WHILE
ALIGHTING.**

Court of Appeals for Richland County.

(Judge Farr of the Seventh Appellate District sitting in place of Judge
Shields.)THE MANSFIELD PUBLIC UTILITIES & SERVICE COMPANY v.
SUE WOLFE.

Decided, January 10, 1919.

*Negligence—Street Car Passenger Not Chargeable with Contributory
Negligence where Thrown and Injured by Premature Starting of the
Car—Conductor Must Know all Passengers are in Places of Safety
before Starting Car—Charge of Court.*Contributory negligence can not be charged against a street car passen-
ger who was thrown and injured by the premature starting of the
car from which he was attempting to alight at a regular stop for
the discharge of passengers.*McBride & Wolfe*, for plaintiff in error.*Mabee & Anderson*, contra.

HOUCK, J.

This case comes into this court on errors alleged to have been committed in the trial of the case in the common pleas court. The parties here stand in the reverse order from where they stood in the court below.

The plaintiff below sets forth in her petition that on the 26th day of February, 1917, she was a passenger on the cars of plaintiff from Shelby to Mansfield, Ohio; that it was customary for passengers to alight from said cars just north of where the tracks of the Erie railroad cross Springmill street in the city of Mansfield, Ohio, and while attempting to alight from said car and while upon the steps of said car and about to step down therefrom on the street, the defendant's servants and agents

who were in charge of said car negligently and without any notice or warning whatever, started the same suddenly forward thereby throwing plaintiff violently to the pavement and as a result of same breaking her arm and causing her other injuries from which she suffered pain, etc. Plaintiff prays for damages in the sum of \$5,000.

The defendant answered, being in the nature of a general denial, and for a second defense alleged that plaintiff was guilty of contributory negligence which was the cause of her injuries, if any she received.

The plaintiff filed a reply in which she denied the charge of contributory negligence. Upon the issues thus raised trial was had and a verdict in favor of plaintiff below was returned by the jury in the sum of \$750. The usual motion for a new trial was filed, heard and overruled.

The errors relied upon and presented in oral argument to this court by counsel for plaintiff in error are as follows:

First. That the trial judge erred in his charge to the jury.

Second. That the verdict is excessive.

Third. That the verdict is against the weight of the evidence.

We have made a careful examination of the record and considered all of the claims of alleged error referred to in oral argument; also all of the errors claimed by plaintiff in error as set forth in the brief of its counsel.

Coming now to the first alleged error we will say that we have read the charge of the trial judge with much care. It is claimed that the court erred in charging as follows:

“But if after the car came to a stop the plaintiff proceeded to leave said car and while it was stopped about to alight therefrom, and the car was then moved forward and such movement precipitated her off the steps of the car, then she would not be chargeable with negligence in attempting to alight therefrom.”

One of the conceded facts in this case is that the car in which the plaintiff was riding had come to a full stop, and that the conductor alighted therefrom and went to the railroad crossing, and while there motioned the motorman of the street car

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to proceed; that after the conductor left the car the plaintiff followed him and started down the steps to alight therefrom, and that while attempting to do so the conductor, who was several feet in front of the car in question, signaled the motorman of said car to move forward and just at that moment plaintiff was thrown to the pavement.

It is urged by counsel for plaintiff in error that said charge is erroneous, because it required too high a degree of care upon the part of the conductor, and that it eliminated entirely any knowledge of the conductor as to the wishes of the passenger to alight.

We think this question has been fully settled by a rule laid down in *Thompson on Negligence*, Section 3520, which reads:

"The high degree of care which the law puts upon the carriers of passengers is not fulfilled in the case of a street railway carrier unless its servants before putting the car in motion see and know that all passengers in the act of alighting have succeeded in doing so in safety and that no passenger is in such a situation as to be put in peril by the starting car * * *."

"It is the duty of the conductor before putting a car in motion to see and know that no passenger is alighting or otherwise in a position which would be rendered perilous by starting the car."

Applying this rule of law to the conceded facts in this case, we feel that the trial judge committed no error in charging the jury as he did. We might further add that we are of the opinion that the charge as a whole was clear and that it covered every question involved in the instant case and we find no error in this regard.

As to the second ground of error that the verdict is excessive, we will say that in view of all of the facts in the case and which were passed upon by the jury, and there being nothing in the record that indicates that the same was rendered from prejudice or passion on the part of the jury, we will not disturb the verdict upon the claim that it is excessive.

As to the third ground of alleged error, that the verdict is manifestly against the weight of the evidence, we are bound to find and do find that this claim is not well taken.

It therefore follows from the observations already made that this court will not disturb the verdict of the jury, and the judgment entered thereon must stand. Judgment affirmed.

POWELL and FARR, JJ., concur.

REVIEW IN CONTEMPT PROCEEDINGS.

Court of Appeals for Hamilton County.

HARRY H. RAGSDALE v. JENNIE W. RAGSDALE.

Decided, November, 1917.

Contempt—Review Provided where the Finding is "Guilty," and also where "Not Guilty"—Such a Case not Appealable—Custody of Children—Orders Pertaining to may be Made in a Court of Equity.

Direct statutory provision for review of contempt proceedings where the party has been found guilty affords ground by analogy for prosecution of error in cases where there has been a refusal to punish for contempt..

Hunt, Bennett & Utter for plaintiff.

W. A. Rinckhoff contra.

HAMILTON, J.

A party found guilty of contempt may have his case reviewed on error under Section 12146, General Code; and while no direct provision in the statute is made to review a refusal to punish for contempt by error proceedings, by analogy it would seem that this remedy may be invoked upon such refusal. But contempt proceedings being quasi-criminal in their nature, can not be considered chancery cases, and such proceedings are not therefore appealable, but may be reviewed on error only.

Questions of custody of children are cognizable in a court of equity, and, when properly before such court, the court will make necessary orders for the support of such children; but no such question is before the court in the instant case.

The motion to dismiss the appeal is sustained.

JONES, P. J., and GORMAN, J., concur.

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Stark County.

**PROSECUTOR MAY DECLARE BELIEF IN GUILT OF
THE ACCUSED.**

Court of Appeals for Stark County.

CHARLES C. JONES v. THE STATE OF OHIO.

Decided, February Term, 1919.

Misconduct of Prosecuting Attorney—May not be Based on Declarations to the Jury of Belief in Guilt of the Accused, When—How Question of Misconduct may be Raised on Review—Weight of Evidence—Charge of Court.

1. A reviewing court will not undertake to determine whether or not remarks made by counsel in argument to the jury constituted misconduct, unless the statements complained of are brought into the record *as made* and not "in substance" only; and the record must further show that the attention of the trial court was challenged by an objection made at the time and an exception entered with the action of the trial court with reference thereto.
2. While a prosecuting attorney should protect the innocent as well as seek the punishment of the guilty, he is not thereby barred from properly expressing in argument to the jury his honest conviction as to the conclusion which should be drawn from the evidence, but on the contrary it is his duty to be vigilant in urging an orderly administration of justice.
3. Use by a prosecuting attorney in his argument to the jury of the words, "I say to you that the defendant is guilty, and I believe we have proven him guilty, and I am willing to bear my part of the responsibility whatever the verdict may be," does not constitute misconduct, but is in effect an expression of opinion that the prosecutor believes, subject to the action of the jury, that the defendant is guilty as shown by the testimony.
4. A verdict returned by a jury in a criminal case containing a recommendation of mercy, except in a first degree murder case, is to be treated as surplusage when such verdict is responsive to the charge in the indictment.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 13, 1919.

Amerman & Mills, Webber & Turner and S. F. Bowman, for plaintiff in error.

W. S. Ruff, Prosecuting Attorney and *T. H. Leahy* contra.

SHIELDS, J.

At the May (1918) term of the court of common pleas of said Stark county the plaintiff in error was indicted for procuring a miscarriage upon the body of Maybelle Henderson, a pregnant woman, in violation of Section 12412, General Code. A motion to quash the indictment being overruled, trial was had resulting in the conviction of the plaintiff in error who was sentenced according to law. A petition in error was filed in this court, alleging numerous grounds of error for the reversal of said judgment of conviction and sentence. In considering said grounds of error we will take them up in the order in which they appear in said petition in error.

1. The first ground alleged was that the court erred in overruling the motion to quash the indictment. The motion to quash was based upon the ground that "said indictment is uncertain and repugnant and defective in the following to-wit: 'that the said Maybelle Henderson on or about the 17th day of April in the year of our Lord one thousand nine hundred and eighteen, in said county, miscarried and was prematurely delivered.'" It clearly appears that the language here quoted from said indictment is to be read in connection with what immediately precedes it, and when so read it is apparent that the objection made is without merit and is therefore not well taken.

2. The second ground alleged is that "the court erred in overruling the demurrer." We find no demurrer among the files in this case, nor does the transcript as prepared and filed by the clerk show that any demurrer was passed on by the court below, nor does it show that a demurrer was filed.

3. The third ground alleged is that "the court erred in not declaring a mistrial on account of the misconduct of the prosecutor." On page 289 of the bill of exception it appears that objection was made on behalf of the defendant below to a certain statement alleged to have been made by Mr. Leahy, assistant prosecu-

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ing attorney, in his argument to the jury on behalf of the state, and which it was claimed was improper and amounted to misconduct on the part of said counsel. Said statement was, in substance: "that in fact the defendant Charles C. Jones was implicated in the Verroun case which said case was tried some time ago in the common pleas court of Stark county." It appears that counsel for the defendant called the attention of the trial court to the remarks of counsel so made and requested the court to instruct the jury to disregard them, whereupon the court cautioned the jury that "Dr. Jones is not on trial for anything that transpired in the Verroun case" and, in substance, that they should not be influenced by remarks of counsel based upon anything outside of the testimony. It likewise appears that the court stenographer was absent from the court room at the time said remark is alleged to have been made, and while counsel for the state denied it was made, as stated, the record recites that it was "in substance" so made. Remarks of counsel *as made* must be brought into the record to enable the court to correctly judge whether or not they constitute misconduct. But aside from this, the record fails to show that any exception was taken to the statement alleged to have been made by the assistant prosecuting attorney in his argument to the jury, and it further fails to show that any exception was taken to the action of the trial judge, to lay the foundation for a review by an appellate court. The attention of the trial court should be challenged by an objection and exception taken at the time. *Davis v. State*, 20 C. C. 430.

It is also argued on behalf of the plaintiff in error that the prosecuting attorney in his final argument to the jury was guilty of misconduct prejudicial to the rights of the plaintiff in error. On page 290 of the record the following appears:

"Defendant objects to statement of prosecuting attorney in argument to the effect:

"I say to you that the defendant is guilty and I believe we have proven him guilty. Then I am willing to bear my part of the responsibility whatever the verdict may be."

Objection overruled.

Defendant excepts.

Mr. Amerman asks the court to instruct the jury to disregard it.

Court—Go ahead.

Defendant excepts.”

Legitimate argument is at all times permissible when based on the evidence in a case, and counsel are not precluded from properly urging their conclusions, deducible from the evidence, to the jury who are the final judges of the facts. Of course this does not mean that counsel are privileged to reinforce their arguments to the jury by their own unsupported personal statements, or in urging their personal belief upon the jury without reference to proven facts or other matters extraneous to the inquiry before the jury, but fair and reasonable argument is and always has been regarded as being within the constitutional right of counsel.

As was said by Judge Davis in *Hayes v. Smith*, 62 O. S., 161, 186, “a generous latitude should be allowed to counsel; but the argument should always be decorous and should not impair the impartial administration of justice.” The question then arises, Was the language used by the prosecuting attorney in argument to the jury such misconduct as that it violated the rights of the defendant below and deprived him of a fair trial? If so, then it is reversible error and a new trial should be awarded on this ground, otherwise it should be denied. It is to be borne in mind that a special obligation is laid upon the prosecuting attorney to “faithfully discharge all the duties enjoined upon him by law, among which is that he make diligent inquiry into all offenses committed within the county and to use every reasonable effort to bring offenders against the law to justice,” and in this connection it may not be too much to say it is the common observation of courts and others as well that in some classes of cases at least this requirement of public duty is beset with difficulties that render the administration of said trust not an easy one under all circumstances. However this may be, every person accused of crime is guaranteed a fair trial under the Constitution and the law, and it should be the common aim of all concerned in the administration of the law to observe this hu-

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mane provision. Quoting from the opinion of Judge Spear in *Miller v. State*, 73 O. S., 195, 205, respecting the duty of a prosecuting attorney, he says:

“It is incumbent upon a prosecuting attorney to aid the administration of justice, and not to so conduct himself during a trial as to defeat the purpose of the law which accords to every person accused of crime a fair and impartial trial. And this is no less a duty where the prosecutor believes the offender guilty.”

While the prosecuting attorney is a semi-judicial officer, presumed to be interested alike in the punishment of the guilty and the protection of the innocent, we do not understand it therefore follows that he is deprived of the privilege of properly expressing his honest convictions in argument upon the effect of evidence laid before a jury. He is not required to remain sphinx-like and witness the cause he officially represents to be lost through his failure to assert the rights of the state, but he owes it to the state to be vigilant to the end that in the orderly administration of justice the interests of the state may not be neglected but properly looked after.

He may not always find the jury agreeing with him, but the same instrument and the same law which afford the humane and charitable presumption of innocence of one charged with the crime, is the same instrument and the same law which afford to counsel generally the right to be heard before the courts, and especially is this the privilege of the prosecuting attorney who is specially charged by the law and by his oath to faithfully represent the interests and welfare of the public. Coming nearer to the question under discussion, it is the opinion of this court that the prosecuting attorney has a public duty to perform, and in its proper and faithful performance lies the only hope of security of the people in the enjoyment of their rights. In the history of criminal trials it may be, and it is doubtless true, that there are instances wherein the comments of the prosecuting officer of a county are so flagrantly violative of propriety and decorum as to require a verdict secured for the state through such means to be set aside on a motion for a new trial because the

accused was thereby deprived of a fair trial, where a new trial was granted and properly so, but let us inquire of the conditions met with here. It does not clearly appear from the bill of exceptions in the light of the preceding exception taken to the remarks alleged to have been made in argument by the assistant prosecuting attorney that the stenographer was present in court and took a note of the remarks made by the prosecuting attorney in his argument at the time they are alleged to have been made, as appears on page 290 of the record, but assuming that they were made as claimed on behalf of the plaintiff in error, what was their effect? Was the effect prejudicial? Although a civil case wherein misconduct of counsel, among other things, was charged during the trial, it was said by the court in *Dock v. Trapnell*, 88 O. S., 516, 521, when referring to side-remarks of counsel in the hearing of the jury,

“Remarks of this kind are wholly improper in the trial of a case and it is the duty of the trial court to see that they are not made, or at least not persisted in, but something must be left to the discretion of the trial court, otherwise we would never reach an end to litigation, and a reviewing court ought never to reverse unless it clearly appears that such misconduct was of such character and so persistent as to prevent a fair trial of the case. While this court will sustain a trial court in compelling counsel to properly conduct their cause and to refrain from all side-remarks and unprofessional conduct either by directions to the jury to disregard these remarks and the punishment of counsel if they persist in offending, or by granting a new trial therefor, yet it will not reverse the judgment until it clearly appears that such conduct was prejudicial to the losing party.”

Again on page 520 the court in said case say:

“While this court agrees with counsel for plaintiff in error that this was misconduct on the part of counsel for the defendant in error, and that the same was reprehensible and wholly inexcusable, yet that fact does not necessarily make it prejudicial to defendant. Counsel in the trial of a case may be guilty of many acts of misconduct that would subject him to reprimand by the court or even to punish for contempt of court, and yet the act may not be prejudicial to the rights of either party to the court

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or even to punishment for contempt of court, and yet the act may not be prejudicial to the rights of either party to the cause, and in such case it would be highly improper to reverse for such reason."

It thus appears that the controlling question is, Did the remark imputed to the prosecuting attorney have an effect prejudicial to the legal rights of the plaintiff in error by way of depriving him of a fair trial? Counsel for plaintiff in error claim that it did, for which he is entitled to another trial, and in support of said claim, we are cited to numerous authorities, among them, the case of *Broznak v. State*, 109 Georgia, 154, which was a criminal case for cheating and swindling. One of the grounds complained of during the trial was that counsel employed to assist in the prosecution of the accused said in his argument to the jury:

"I would not appear in this case, if I did not believe the defendant to be as guilty as any man that was ever tried in the court house."

The trial court held this was "legitimate argument." Upon error it was reversed for reasons that are most obvious. Yet in this case the court, quoting from counsel's brief, say:

"Yet one may well argue, and he should, that the testimony has established his client's cause."

Jackson v. State, 166 Indiana, 464, cited on behalf of the plaintiff in error, was an indictment for adultery wherein the prosecuting attorney in his closing address to the jury used the following language:

"Washington Jackson's wife is heart-broken over his conduct with this woman. I know what I am talking about. I have been to Greenfield, and heard the evidence before the grand jury, and I know what those people think about this case."

That this language was grossly improper for the prosecuting attorney to go outside of the record and make said statement no

one will dispute. It was an expression of opinion founded on alleged information wholly outside of the record.

Howard v. Commonwealth, 110 Kentucky, 356, also cited on behalf of the plaintiff in error, was a first degree homicide case where the regular attorney for the commonwealth did not appear, but was represented by another who in his closing address to the jury used the following language:

"I am commissioned by Robert Franklin (the commonwealth's attorney) to say to the jury that he is in thorough accord and sympathy with the prosecution, and that he thinks the defendant guilty, and hopes the jury will hang him higher than Haman."

It is unnecessary to say that the mere statement of this bravado declaration furnishes its own comment.

People v. John Dane, 59 Michigan, 550, also cited on behalf of the plaintiff in error, was a prosecution for larceny and in his closing address to the jury, it is apparent that the prosecuting attorney urged his own personal statement to the jury without any qualification whatever, going so far as to state that he knew that the defendant was guilty of taking the money, yet quoting from counsel's brief we find that the court in this case say:

"It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of this duty an act of zeal is commendable. Yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice; and it is improper for one occupying the position of the prosecuting officer to make a statement to the jury of a fact, as of his own knowledge, which has not been introduced in evidence under the sanction of an oath, relating to the material issues in the case."

Goings v. State, 24 C.C.(N.S.), 145, was also cited on behalf of the plaintiff in error. This was a homicide case wherein the prosecuting attorney in his argument to the jury gave to the jury a false impression of the real status of the principal witness for the defense, intimating that said witness had been tried and ac-

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quitted of the crime for which Goings was then undergoing trial, all of which was untrue. This was considered by the reviewing court equivalent to a deliberate mis-statement of a material matter in the case, and on this account the court set aside the verdict.

We think it will appear that the foregoing cases are not parallel cases with the case at bar, but wholly different.

While we have already indicated the general trend of opinion on this question by the Supreme Court of this state, the same question has received the attention of courts in other jurisdictions, cases being cited in the brief of counsel for the defendant in error, among them, *Fertig v. State*, 100 Wis., 301, which was a first degree homicide case wherein it was held that,

"It does not transcend the bounds of legitimate argument in a criminal case for the district attorney, reasoning from the evidence in the case, to say that the accused is guilty of the offense charged. Within the record, the field of legitimate argument is broad enough to permit the prosecuting attorney to say, with the utmost freedom, what the evidence tends to prove, and that it convinces him, and should convince the jurors, of the fact in issue."

"Where evidence strongly tends to prove the fact of guilt, it is not reversible error for the prosecuting attorney to assume the truth of such evidence, and say from it that the accused is what such evidence tends to establish in regard to guilt."

In *People v. Hass*, 85 Michigan, 128, it was held that:

"It is not proper for the prosecuting officer to tell the jury that he believes the defendant guilty as his belief is not evidence in the case; but he has the right to argue from the testimony the fact of his guilt and to state to the jury what evidence before them convinces him, and should convince them, of such guilt."

In *State of Iowa v. Beasley*, 84 Iowa, 83, it was held that the statement of the county attorney in his argument to the jury in a criminal cause that he was convinced beyond a reasonable doubt that the defendant was guilty will not entitle the defendant to a new trial.

In 12 Cyc. p. 580 it is laid down that.

"It is reversible error for the prosecuting attorney in his argument to the jury to declare his individual opinion or belief not expressly stated to be on the evidence that the accused is guilty, or to state that defendant's counsel advised him to plead guilty. He may, however, argue to the jury that the evidence in his opinion shows guilt, or that it convinces him of the guilt of the accused. Such argument will not necessitate the granting of a new trial."

From these authorities we think the recognized rule is that the prosecuting officer may draw his own conclusions based upon the evidence, and in argument he may in a proper way state them to the jury and argue from that standpoint. Now if we have correctly stated the rule, applying such rule, what have we in the case before us? Analyzing what was said, we think it appears that the prosecuting attorney was convinced of the defendant's guilt by the testimony in the case, and that he so stated to the jury. "I say to you that the defendant is guilty, and I believe we have proven him guilty, and I am willing to bear my part of the responsibility whatever the verdict may be!" Is'nt the opinion here expressed, in effect, that, subject to the action of the jury, the prosecutor believed that the defendant was guilty as shown by the testimony? We think it was. The belief expressed was not personal but based upon the testimony in the case, and without extending this discussion further, we hold that the exception is not well taken.

4 and 5. The fourth and fifth grounds alleged are that the court erred in the admission and rejection of testimony offered upon the trial. On account of the importance of the case both to the plaintiff in error and the state, we have read and examined the entire bill of exceptions with considerable care, including the rulings of the trial judge arising upon testimony offered during the trial, and we find no substantial ground for complaint by the plaintiff in error, upon either of the grounds alleged. The trial was a lengthy one and it is apparent that the expert testimony, which embraces the larger part of the voluminous bill of exceptions, was allowed to be given by the professional witnesses at great length. No error is found upon either of these grounds.

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6. The sixth ground alleged has already been treated and disposed of under the third ground herein.

7. The seventh ground alleged is "that the verdict was for the state of Ohio when it should have been for the defendant." As already stated, we have read this entire record, and while there appears to be a sharp conflict in the testimony of the prosecutrix and that of the accused as to the operation in question having been performed by the latter upon the body of the former, as well as a conflict in the testimony of the numerous professional witnesses who testified, it is to be remembered that facts are the property of the jury to determine, and when so determined under proper instructions of the trial court, the verdict of the jury should be upheld, unless the same is not sustained by the evidence, or is clearly against the weight of the evidence. Here there was testimony before the jury supporting the contention of both the state and the defense, and the credibility of the witnesses and the weight to be given to their testimony was for the jury. Commenting on the conflict of evidence in a criminal case, Judge Peck in *Breece v. State*, 12 O. S., 146, 156, said:

"The jury who try a cause and the court before which it is tried, have much better opportunities to determine the credibility and effect of the testimony, and we ought, therefore, to hesitate before disturbing a verdict rendered by a jury and confirmed by a court, possessing such advantages, merely because there is an apparent conflict in the testimony."

And the court in that case held that:

"A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony."

Applying the rule of law above stated to the evidence presented in this case, we find no sufficient ground to warrant us interfering with the verdict rendered.

8. The eighth ground alleged is that "the court erred in refusing to grant a new trial to the defendant below." This

covers the several grounds already disposed of, including exception No. 9, as well as the exception to the action of the court below in giving the state's request No. 1 (p. 283 of the record) in charge to the jury before argument and which was as follows:

"Though you are not to convict the defendant upon the uncorroborated testimony of Maybelle Henderson, it is not necessary that the crime charged be proved independently of the testimony of said Maybelle Henderson, or that the testimony of Maybelle Henderson be corroborated in every particular; but it is only necessary that there be circumstantial or direct testimony in addition to the testimony of Maybelle Henderson tending to connect the defendant with the crime charged and to prove some of the material facts testified to by Maybelle Henderson."

Written requests to be submitted to the jury by the court before argument in a civil case are specially authorized under Section 11447, subdivision 5, General Code, and which is as follows:

"When the evidence is concluded, either party may present written instructions to the court on matters of law and request them to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

And Section 13675, subdivision 5, General Code, which relates to criminal procedure, provides:

"When the evidence is concluded, either party may request instructions to the jury on the points of law, which shall be given or refused by the court; such instructions shall be reduced to writing if either party requests it."

The only difference we see in these two Sections is that under the first Section referred to requests may be submitted in writing while in the second Section referred to if requests are submitted, they shall be submitted in writing only on request. Here it appears that the requests both for the state and defense were submitted at the conclusion of the evidence and that no request

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was made that such requests so submitted be in writing, nor does it appear that the charge of the court to the jury be in writing.

That the instruction given on behalf of the state contains the law as announced by our Supreme Court in the case of *State v. Robinson*, 83 O. S., 136, and *State v. Lehr*, 97 O. S., 280, and the law applicable to the case before us, admits of no question in our judgment.

9. The ninth ground alleged is that "the court erred in its charge to the jury." Without here reviewing said charge at any length, suffice it to say that we have examined it, and in our judgment it contains a correct and impartial statement of the law as applied to the case presented. After treating of the general nature of the charge, it takes up and describes an accomplice under said section of the statute, cautioning the jury as it does against conviction in this class of cases without corroboration of the testimony of the prosecutrix as to some or all of the material facts necessary to establish the crime charged. Commenting on the necessity of either direct or circumstantial evidence being clearly shown before the jury are authorized to convict, the learned trial judge says, on page 298 of the record:

"Before you can convict the defendant in this case the evidence, whether direct or circumstantial, or both, must be so clear and convincing as to exclude from the minds of the jury all reasonable doubt of the defendant's guilt. Each and every circumstance and fact from which an inference is sought to be drawn against the defendant must be proved beyond the existence of a reasonable doubt before such inference can be legitimately drawn."

Taken all in all, we regard said charge as unexceptionable and free from prejudicial error.

The claim made on behalf of the plaintiff in error that said charge on page 297 of the record is open to criticism where said court instructed the jury that they must find that the testimony of the prosecutrix is corroborated as showing the truth of her statement, we can not assent to. Such charge is in harmony with the rule laid down in both the *Robinson* and *Lehr* cases already

cited, and we think the proposition stated, and as stated, is sound law. In this connection it was argued that the testimony of the prosecutrix was lacking of corroboration, even assuming that the jury had been properly instructed in the respect mentioned. As was said by Judge Summers, speaking for the court in the Robinson case cited, on page 143 of said case.

“It is not necessary that the crime charged be proven independently of the testimony of the accomplice, or that the testimony of the accomplice be corroborated in every particular in order that it may be said to be corroborated, but only that there be circumstantial evidence, or testimony of some witness other than the accomplice, tending to connect the defendant with the crime charged and to prove some of the material facts testified to by the accomplice.”

Here the testimony of Charlotte Henderson (pp. 12-13 of the record) was that after she saw the plaintiff in error at her home on Tuesday, April 16th, 1918, the day of his first call at the Henderson home, her sister Maybelle was up and about and in health when she (Charlotte) left the house to go to the laundry, and about a half hour afterward and after her return to her home she found her sister upstairs in bed and the plaintiff in error still in the house, and that her sister remained in bed the following day and off and on for several days thereafter. The witnesses, Mrs. Creighton, who was living in the Henderson home, and Mrs. Schauer, a neighbor, also testified (pp. 58-66 of the record) that Maybelle had been about the house and in health until Tuesday, April 16th, when she was taken ill and went to bed. And the witness P. D. Howell testified (pp. 93-96 of the record) that the plaintiff in error stated to him at the sheriff's office that Charlotte Henderson on the occasion of his first call at the Henderson home was about to leave the house and go down street and did so leave, and that he was at the house when she returned, as Charlotte also testified. It was the province of the jury to consider and analyze the testimony of these witnesses as to whether or not said witnesses in any manner corroborated the testimony of Maybelle Henderson. It is sufficient to say

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that this court finds that the testimony of said witnesses affords corroboration of her testimony.

Nor are we of the opinion that said charge is open to the objection made with reference to the question of venue. The indictment charged that the act was committed in Stark county, Ohio, which was read to and thereby formed a part of said court's charge to the jury, and which fact was testified to upon the trial by both Maybelle and Charlotte Henderson. We fail to discover how any prejudicial error could possibly result from this fact.

And it was also claimed that there was a fatal variance between the name of Maybelle Henderson as averred in the indictment, and her true name as shown during the trial, and that said court erred in not calling attention to the fact in its said charge. Maybelle Henderson testified that her name was Maybelle Henderson, that she is and was known and recognized by that name and by none other, and that Charlotte Henderson was her sister. Under the liberal provisions of the Code, we find no legal justification for the court below in departing in this instance from what has become a well settled rule in the administration of criminal law.

10. Under the tenth ground of error it was urged on behalf of the plaintiff in error that the verdict as returned by the jury was irregular in form and should not have been received because it contained a recommendation of mercy. The issue tendered by the indictment was whether or not the plaintiff in error was or was not guilty of the offense therein charged, and the verdict was as follows.

"We the jury impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the prisoner at the bar, Charles C. Jones, do find the defendant guilty as he stands charged in the indictment and recommend the mercy of the court."

Was said verdict responsive to the issue? True it contained a recommendation to mercy as stated, but the verdict was guilty as charged. Did the recommendations to mercy in any wise affect

the validity of the verdict? Was it not a valid verdict without the recommendation made which was not included in the instructions of the trial court? We think it was, and the recommendation made was surplusage only and is to be treated as such. Perhaps the best and most satisfactory statement of the law on this subject is to be found in 38 Cyc., pp. 1890-1891, where it is laid down that

“Verdicts are to have reasonable intendment, and surplusage or immaterial findings may be rejected in construing them. Thus, if the verdict finds the issue and something more, the latter part of the finding will be rejected as surplusage, and judgment rendered independently of the necessary matter, there being nothing to show that the jury reasoned falsely. And a verdict will not be invalidated merely because the jury, through their foreman, immediately after the rendition of the verdict expressed their opinion as to the merits of the case, such opinion not being at variance with the verdict, or made an award concerning costs, or, the cause being submitted to the jury on special issues alone, they return a general verdict therewith, and so much of the verdict as relates to facts admitted by the pleadings may be stricken out. All these matters will be treated as surplusage, and judgment rendered on a valid part of the verdict, and it is not fatal that the verdict is not technically accurate if the court can see how it should be corrected.”

Under the rule herein cited, we hold that the verdict was responsive to the indictment and that the recommendation to mercy is to be treated as mere surplusage.

Upon the whole case we are of the opinion that the plaintiff in error had a fair trial, that his rights were properly safeguarded by the rulings of the trial court upon all questions arising during the trial, and by said court in its charge to the jury, and that the verdict of the jury is sustained by the evidence and the law.

The judgment of the Court of Common Pleas will be affirmed and said cause will be remanded to said court for execution of sentence. Exceptions.

HOUCK and PATTERSON, JJ., concur.

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**CLAIM FOR EXCESS FARE NOT ENFORCEABLE WHERE DUE
TO MISROUTING.**

Court of Appeals for Franklin County.

COLUMBUS TENT & AWNING CO. v. CLEVELAND, C. C. & ST. L. RY.

Decided, March 27, 1919.

Railways—Additional Fare for a Party Not Collectable—Where Full Fare was Paid—But There was a Violation of Traffic Rules Due to Misrouting.

A railway company, whose ticket agent sold at full regular tariff rates two tickets for two parties of sixteen and nineteen men respectively, and agreed to furnish a special baggage car free, can not recover further compensation in excess of the service actually rendered for the transportation of one of such parties because of a transportation rule that a special baggage can be furnished free only for a party of not less than twenty-five adults, holding tickets at regular tariff rates, where the issuing of the tickets and the division of the party was determined by the ticket agent and no misquotation of fare rates was made.

Thomas M. Sherman, for plaintiff in error.

Wilson & Rector, for defendant in error.

FERNEDING, J.

In the municipal court in the city of Columbus an action was brought by the Cleveland, C. C. & St. L. Ry. against the Columbus Tent & Awning Co. to recover the sum of \$15.75 representing the tariff rate for three passenger tickets from Columbus, Ohio, to Erie, Pennsylvania. The municipal court rendered judgment for the defendant.

Upon petition in error to the court of common pleas this judgment was reversed and a final judgment was rendered in favor of the railway company for the amount of the claim. The case is now brought to this court upon petition in error.

The facts upon which the claim is made are substantially agreed upon and are as follows:

On or about September 11, 1916, the Columbus Tent & Awning Co. desired to transport thirty-five men from Columbus, Ohio, to Erie, Pennsylvania, and to obtain for their use from the railway company free of charge, a special baggage car for the transportation of the baggage. The tent and awning company wanted to ship the men in two parties of sixteen and nineteen respectively, provided it could be done without a violation of the rules of the railway company so as to secure said special baggage car free of charge. At the time of the purchasing of the tickets the manager of the tent and awning company stated that while he would prefer to send sixteen on one ticket and nineteen on another ticket this preference would be subordinated to the rules of the company and he would so divide the number as to comply in all particulars with the requirements of the railway company, insuring a special baggage car free of charge and left to the agent of the railway company the issuance of the tickets for the party of thirty-five in compliance with the regulations. The agent of the railway company before issuing the tickets in the ratio set forth consulted with the company's general officers at Cincinnati as to the company's requirements in the premises with the result that he assured the manager of the tent and awning company that the parties represented by the tickets would be entitled to transportation and the use of a special baggage car without cost or additional charge and could be divided into parties of sixteen and nineteen. These negotiations resulted in the purchase by the plaintiff in error of two tickets, one calling for sixteen passengers and the other for nineteen passengers with a special baggage car to transport the baggage. The sixteen men were transported on September 11; the remaining nineteen on September 17. The fare paid for each passenger was \$5.25, which was the regular tariff rate. The record is not absolutely clear whether the special baggage car was furnished at the time of the transportation of the party of sixteen or of the nineteen.

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The recognized rule of the railway company, as embodied in the published tariff schedule, is to the effect that a special baggage car will be furnished free in connection with the transportation of a party of not less than twenty-five adults holding tickets at the regular tariff rate, provided the aggregate amount of such fares is not less than \$25.00. The tariff schedule also provides that where it is found not to be convenient to transport the baggage car on the same train as the passengers the arrangements may be made for not to exceed three employees to accompany the baggage car, and a separate ticket may be issued therefor at the same per capita fare as charged the other members of the party.

The railway company now contends that it was incumbent upon the tent and awning company to purchase at least twenty-two adult tickets in one party in order to obtain the concession of a free baggage car, and that having obtained the use of a free baggage car on a transportation of only nineteen adults in one party, the railway company was and is entitled to charge the tent and awning company for an additional three passenger tickets which would represent a total of twenty-five, less the three permitted by the rules of the company to travel on another train. In support of this contention counsel for the railway company rely largely on two decisions of the Supreme Court of the United States, to-wit: *Texas & Pacific Ry. v. Mugg*, 202 U. S., 242; *Louisville & N. Ry. v. Maxwell*, 237 U. S., 94. In the Mugg case there was an undercharge for services actually rendered and we do not think that applies to this case.

Preliminary to a consideration of the Maxwell case, let it be said that the Supreme Court of the United States has, according to its own dictum in said opinion, announced the establishment of a very vigorous rule in order to uphold the policy of the Interstate Commerce Act so as to prevent discrimination between railway companies in the transportation of passengers and freight.

Not infrequently has it been held that a shipper is bound to pay the published tariff rate for a given shipment notwith-

standing that such shipper may have been ignorant of such rate and relied upon the agent of the railway company who inadvertently and unintentionally gave such shipper a lower rate.

In the Maxwell case, *supra*, the agent of the railway company gave Maxwell the same rate over several lines. Maxwell chose an indirect route. The agent informed Maxwell that the fare upon either route was the same. Later it was discovered that the published tariff rate for the transportation previously secured by Maxwell exceeded in amount that charged by the agent of the railway company to Maxwell at the initial point, and Maxwell was required to pay the difference. It is important to observe at this point that Maxwell actually secured a service at less cost for which the higher rate was fixed by the published tariff schedule. In other words, Maxwell secured certain transportation at a cost less than authorized by the interstate commerce act.

Mr. Justice Hughes, in speaking for the court, said:

"Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

It seems clear that there is a marked distinction between the Maxwell case and the case at bar. In the former, Maxwell was merely required to pay for the service actually obtained and at the regular tariff rate. In the case at bar the railway company is asking the tent and awning company to pay for three passenger tickets in excess of the service actually furnished. The tent and awning company paid not only for twenty-two adult fares, but, as a matter of fact, for thirty-five adult passengers actually transported.

We are unable to comprehend, even under a most rigid construction of the interstate commerce act as defined in the opinion of Mr. Justice Hughes, how the railway company could legally maintain an action for the recovery of the price of three

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additional passenger tickets when no such passenger service had been furnished.

If the tent and awning company had secured a baggage service to which they were not entitled, the railway company's only remedy would be to recover for such excess baggage service.

We are of the opinion that the tent and awning company did not obtain any service which they were not entitled to under the record in this case. There is no element of doubt that if the tickets had been properly issued and the parties to be transported properly divided as to numbers, no claim would have been made of an undercharge. The issuing of the tickets and the division of the party as to numbers was left to the agent of the railway company. The controversy as to the charges in the case at bar arises not out of any misquotation of rate, but solely because of error of the agent in routing the party as to number. This feature finds some support by Mr. Justice Hughes in the following comment:

"A misstatement or misquotation of the rate over a given route is one thing, misrouting is a different matter. We do not think that it can be said that there is a misrouting, in any proper sense, when the route given by the company is that requested by the shipper or passenger."

The turning point in the Maxwell case was that the passenger requested and obtained particular service, for which he was required to pay the full tariff rate.

In the case here under discussion we think the shipper paid the full tariff rate for the service he actually requested; whatever error was made was due to the mistake of the agent of the railway company in issuing the tickets, and not by the tent and awning company in accepting the transportation, for which it paid the full tariff rate.

The rule announced in the Maxwell case was stated to be a harsh one. Of course the infringement of a settled and fixed policy, while beneficial and wise in a general application, may, in the case of some individual operate unfairly, yet under all

the facts and circumstances of the present case we think it is not one requiring such general policy of the act to be invoked in the case at bar.

It therefore follows that the judgment of the court of common pleas should be reversed, and that of the municipal court affirmed.

ALLREAD and KUNKLE, JJ., concur.

INJURY TO A WAITING PASSENGER.

Court of Appeals for Cuyahoga County.

KEIFER V. THE CLEVELAND RAILWAY CO.

Decided, October 22, 1917.

Negligence—Causes May Blend into a Single Proximate Cause—Waiting Passenger Injured by Having Another Thrown Against Him.

1. There may be more than one proximate cause of an injury.
2. Where concurrent causes are the immediate and efficient cause of an injury, it is not competent to take one of them away from the other, and say that it and not the other was the proximate cause of the accident.
3. Where two men are standing near a street car track, in a space used by passengers waiting to board cars, and the end of a street car being operated on a curve at a prohibited rate of speed strikes one of the men and hurls him against the other, injuring the latter, it is error in an action for damages by the injured man against the street car company, to direct a verdict for defendant at the close of plaintiff's evidence disclosing such facts, the case being one that should have been submitted to the jury.

T. S. Dunlap and F. F. Klingman, for plaintiff in error.
Squire, Sanders & Dempsey and William L. Day, contra.

LIEGHLEY, J.

Error to Common Pleas Court of Cuyahoga County.

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The parties stood in the same order below.

It is a matter of common knowledge that the Public Square in Cleveland, Ohio, is divided into four sections by intersecting streets; that cars of the defendant serving the west and southwest parts of the city loop around the northwest section of the Public Square; that on the westerly side of the northwest section of the square there are two southbound tracks with a devil strip between them of approximately ten feet in width; that passengers or prospective passengers take position on this devil strip waiting to board cars that use the easterly southbound track; and that at or near Superior avenue these two southbound tracks converge and lead into and upon Superior avenue and said cars proceed westerly on the northmost track on Superior avenue. For the most part, and so far as necessary, the facts above stated are disclosed by the proof in this case.

As was his practice, the plaintiff, Jacob Keifer, on the 18th day of August, 1914, boarded a St. Clair avenue car near his home in the east end, purchased a transfer to a West 14th street car, and proceeded to the Public Square where he alighted and walked over to the said devil strip on the west side of the northwest section of the square above described. He took position on said devil strip with the purpose in mind of boarding a West 14th street car, then using this loop by reason of the damaged condition of the Central Viaduct. While he was so standing there an Italian approached him and excitedly inquired about a car, repeating his inquiry and gesticulating for some little time. While the two were so standing there, a city street car passed by them, which was followed by an interurban car operated at the time and place in question by the defendant. The rear end of said interurban car extending far over the rail in making the curve, and proceeding at the rate of ten miles per hour around the curve into and upon Superior avenue, struck the said Italian, hurling him against plaintiff, who was then and there severely injured by being hurled to the pavement by the force of the said Italian striking him.

It is disclosed by the proof that the said street car was operated in violation of a traffic ordinance of the city which provides that street cars shall travel at no greater rate of speed than four miles per hour in turning a corner of a street, and it is urged that this is negligence *per se* on the part of defendant, upon the authority of *Schell v. DuBois, Admr.*, 94 Ohio St., 93.

It is further urged by the plaintiff that, by reason of the fact that the body of an interurban car extends farther beyond the rear trucks than does the body of the ordinary street car, the sweep of the rear end of an interurban car in making a curve is much greater than that of a city car; that the motorman saw or should have seen the perilous position of the Italian, whose name is unknown, as he approached and passed the place where the plaintiff and the Italian were standing; and that the motorman should have known that the rear end of this car, in making the curve, would strike the Italian.

The plaintiff rested his case in the court below upon the testimony of the plaintiff himself and the ordinance above referred to admitted in the proof.

The court directed a verdict for the defendant, and from this judgment error is prosecuted to this court to reverse.

The testimony of the plaintiff tends to establish contributory negligence of the Italian in facing eastward with his back to the westerly southbound track and not using his senses for his own safety at the time.

Undisputed testimony of the plaintiff establishes the negligence of the defendant in operating its car in violation of said traffic ordinance.

The question presented to us for decision, under the claimed admitted facts in this case, is, What was the proximate cause of the injuries which the plaintiff sustained, or, should this question have been submitted to the jury for answer?

Apparently it was the judgment of the court below that the negligence of the Italian proximately caused the injury, and, assuming the facts to be admitted, a decision of this question

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was for the court, under authority of *L. S. & M. S. Ry. Co. v. Liidtke*, 69 Ohio St., 384.

It is claimed by the plaintiff that at the time he was injured he was a passenger and that the defendant owed to him the duty of exercising more than ordinary care for his safety. We do not feel that in a decision of the principal question before us it is absolutely necessary to determine whether or not the plaintiff was then a passenger. However, at the time plaintiff was injured he was standing in a place of safety on the devil strip and at a place where the company is accustomed to take on passengers. And it is evident that he would not have been injured if the rear end of the interurban car had not struck the Italian, hurling him against the body of the plaintiff, or if the Italian had not negligently placed himself in the path of the rapidly turning street car. At the time, the plaintiff was in the process of transferring from the St. Clair car to the Fourteenth street car, and had in his possession a transfer. The greater weight of authority is to the effect that the plaintiff was then, in fact, a passenger. *Cincinnati Traction Co. v. Holzenkamp*, 3 N. P. (N.S.), 537, 540; affirmed, 74 Ohio St., 379, and 1 Nellis on Street Railways (2 ed.), Section 254.

Something was said in argument to the effect that the cases in which the intervening object caused the injury was inanimate are to be distinguished from the case at bar for the reason that in this case the intervening object was a rational human being. If there be any distinction, it seems to us that to negligently injure a human being, thereby resulting in injury to another, without fault on his part, would be more culpable than to injure in the first instance an inanimate or irrational object. We do not think that the authorities are in accord with this suggestion.

Attention is called to the case of *McCormack, Adm.x., v. Nassau Elec. Rd. Co.*, 16 App. Div., 24 (44 N. Y. Supp., 684), in the syllabus of which the facts are sufficiently stated, in conjunction with the law of the case. The syllabus reads as follows:

"The act of a motorman in starting up an electric car at a time when the driver of an ice wagon, which is distant from the car about 133 feet, and is in plain sight of the motorman, is beginning to turn his wagon preparatory to crossing the street, and in so operating the car that it collides with the wagon, inflicting injuries upon a person employed thereon as a helper, who has jumped upon the rear step of the wagon as it was turning, constitutes negligence on the part of the railway corporation.

"A refusal by the court to charge the jury, in such a case, that if they find that the accident was occasioned in part by the negligence of the defendant, and in part by the negligence of the driver of the ice wagon, the plaintiff (the helper) can not recover, does not constitute an error requiring the reversal of a judgment in favor of the plaintiff, where the defendant, although it bases such request upon a claim that the driver of the wagon and his helper were engaged in a joint venture of their own in the ice business, makes no request to have the question of the existence of such a joint venture between the parties submitted to the jury."

See also *Pullman Palace Car Co. v. Laack*, 143 Ill., 242, 261, and authorities hereinafter cited.

If it be claimed that a showing to the effect that the Italian was negligent and that his negligence directly contributed to cause the injury of the plaintiff, to such an extent that the Italian could not recover from the railway company for his injuries, precludes the plaintiff from recovering from the defendant, we are unable to concur in that claim. We are unable to concur for the reason that there may be more than one proximate cause of an injury.

Quoting from the syllabus in the case of *Geary v. Metropolitan St. Ry. Co.*, 82 N. Y. Supp., 1016 (84 App. Div., 514; affirmed 177 N. Y., 535):

"A requested instruction in an action for death of a fireman occasioned by collision of the fire truck on which he was riding and a street car, that, if the proximate cause of the collision was the negligence of the driver of the truck, and the collision would not have occurred had he exercised reasonable care,

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plaintiff could not recover, is bad—any contributory negligence of the driver not being imputable to deceased—because there may be more than one proximate cause of an accident.” See also *Phillips v. N. Y. C. & H. R. Rd. Co.*, 127 N. Y., 657.

In the case at bar, was it the negligence of the Italian alone that caused the injury to plaintiff? Or, was it the negligence of the defendant alone that caused it? Or, was it the combined and concurrent negligence of both that caused the injury?

In the case of *Zeihl v. The Maumee Paper Co.*, 7 C. C. (N.S.), 144, the facts are briefly as follows:

Zeihl was employed by the defendant to operate a certain “beater” machine, which machine was used for the purpose of beating paper soaked with water preparatory to remanufacture of the same. In the construction of said machine there were two cogwheels exposed and unguarded on the outside of the machine. Water was spilled from various machines that were on the floor, so that the floor was at all times slippery. The plaintiff slipped on the floor, fell forward, and his hand was caught in the cogwheels and injured. He filed a petition in the common pleas court, charging the defendant with negligence in permitting said machine to become defective, in that it could not at the time be thrown out of gear, and in not guarding the same. The trial court directed a verdict on the ground that it was the slipping of the plaintiff on the floor that was the proximate cause of his injury and not the alleged negligence of the defendant. This judgment was reversed.

The second paragraph of the syllabus reads as follows:

“Where concurrent causes, as in this case, are the immediate and efficient cause of an injury, it is not competent to take one of them away from the other, and say that it and not the other was the proximate cause of the accident.”

Quoting from the opinion at page 148, the court says:

“Now it seems to us that the true rule is, as we gather it from the authorities, that where, in case of master and servant,

like this case, the negligence of the master is one of the causes of the servant's injury, is one of the causes without which he could not have been injured as he was, that the fact that the negligence of a third person is also a cause of his injury, or the fact that some inevitable or unavoidable accident occurring at the same time was the cause of his injury, or some inanimate object, that, nevertheless, if the master's negligence may be said to be one of the proximate causes of the man's injury, that the master is not excused, because the negligence of some one else has contributed, as well as his own negligence, or because some accident, some unavoidable accident, happening has also contributed to the servant's injury, if it appears that without the negligence of the master the accident could not have happened. Now it seems to us that this rule laid down in many of the authorities is a just and reasonable rule. Many accidents are caused by two or more concurrent causes."

In the opinion will be found many authorities supporting this language of the court.

Quoting from the syllabus in the case of *John R. Gray et ux. v. Washington Water Power Co.*, 27 Wash., 713:

"Where plaintiff was injured as a result of her horse running away and dashing the wheels of her buggy against the projecting rails of a street railway, the action of the court in setting aside a verdict in her favor and granting a new trial, on the ground that the running away of the horse and the loss of its control was the proximate cause of the accident, was erroneous."

The question is: Was the negligence of the Italian, the street car company, or both, the proximate cause of the injuries which plaintiff sustained? Under the circumstances of this case, we are not at all certain that reasonably prudent persons would answer this question in the same way. This being true, we conclude that this case should have been submitted to the jury.

It may be claimed that the same result would have obtained if the street car had been propelled at a legal rate. Of course, if the same result would have followed the operation of the car at four miles per hour as did result by operating it at ten

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miles per hour, then speed did not have anything to do with the results and the negligence of the railway company could not be the proximate cause of the injury; but, in the determination of this question, we are of the opinion that reasonably prudent minds may reach different conclusions, and, therefore, that it is a question for the jury.

See cases above cited; also *C. & C. Rd. Co. v. Crawford, Admr.*, 24 Ohio St., 631; *M. & C. Rd. Co. v. Picksley, Id.*, 654, and *Steubenville & Wheeling Traction Co. v. Brandon*, 87 Ohio St., 187, 194.

For error in directing a verdict for defendant at the close of the plaintiff's evidence, the judgment of the court below is reversed and the cause remanded, with costs assessed against the defendant in error.

Judgment reversed, and cause remanded.

GRANT and CARPENTER, JJ., concur.

WHAT CONSTITUTES INTEREST IN AN ESTATE.

Court of Appeals for Hamilton County.

DuBRUL v. DuBRUL ET AL.

Decided, July 9, 1917.

Wills—One Son Given No Interest in His Father's Estate—But May Receive Advancements from the Trustees—May Not Examine Books With Reference to the Distribution.

Where under the terms of a will general authority is given to the trustees of the estate to make such advancements to any of the sons of testator as may seem wise to said trustees, and one of the five sons is given no interest in the estate of his father and is not entitled to share in its distribution, such son can not compel the executors to give him a statement of the advancements made to him and to his brothers by his father or permit an examination of decedent's books to obtain such statement.

Charles F. Dolle, for plaintiff in error.

Anthony B. Dunlap, contra.

JONES, P. J.

Error to Common Pleas Court of Hamilton County.

The will of Napoleon DuBrul appoints his widow and his son Ernest as executors, and directs the payment of his debts as soon as convenient after his decease. All the rest and residue of the estate is given to his wife and four of his sons in trust, to manage and control during the lifetime of his wife, and out of same to provide for her support.

The third item is as follows:

"Item III. I authorize and empower my said Trustees to make such advancements to my sons, or any of them, as may seem to said Trustees to be wise, and as the condition of my estate shall justify; and I hereby direct my Trustees to charge each of such sons with the amounts so advanced as part of their several distributive shares of my estate."

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The fourth item directs the trustees upon the death of his wife to divide his estate into five equal parts, four of which parts are devised and bequeathed to his four sons, Ernest, Davilla, Clarence and Telford, one part to each, "subject however to such advancements as may have been made to them by my trustees as herein provided, or by me." It also makes provision for the care of the widow or of the issue of any of said four sons, in the event of the death of a son before the death of testator's wife. It then recites:

"I have made advancements, and may in the future make advancements to some of my sons. The amounts so advanced will be found charged to such sons in my private books, to which they have been transferred from private papers or memoranda, and from the books of The Miller, DuBrul & Peters Mfg. Company, and of the Summerside Poultry Farm.

"I direct and will that my Trustees, at the time of the distribution of my estate, as herein provided, shall charge such son or sons in computing his or their distributive shares, with such sum or sums as may respectively be shown by my books, papers, etc., to be due from each, and deduct the same from the share or shares such son or sons would otherwise receive, so that my bounty to each may be exactly equal."

Then after reciting certain charges and credits as to his son Orville, he provides as follows:

"As I consider that Orville has proved himself so lacking in business judgment as to be incapable of properly handling or caring for any share of my estate that might be coming to him on final distribution, I direct and will that my Trustees shall retain in their hands the one-fifth part remaining after distributing the four-fifths as above provided in trust however for the following purposes: to manage, control, and look after said part; to use the income, if any, and the principal, if in their judgment that be proper, to provide suitable support for Nan McDaniels DuBrul, wife of my son, Orville, and their children Napoleon and Marguerite DuBrul, as well as education for said children; and to pay said one-fifth part, less all deductions for advances heretofore made, or hereafter to be made, or as much as may then remain; in equal parts to my said grandchildren

Napoleon and Marguerite DuBrul, when the one latest to arrive at legal age shall have reached that age."

Orville N. DuBrul, now as plaintiff in error, seeks to reverse the judgments of the common pleas and probate courts refusing to require the executors to give to him a statement of the advancements made to him and to his brothers by his father and entered by him in his private books, or to permit an examination of decedent's books to obtain such statement.

Plaintiff in error claims that, regardless of his ultimate interest in his father's estate, the trustees are authorized in their discretion to make advancements to him under the provisions of Item III, and for that reason he is entitled to see or be furnished a statement from the books of decedent. The application was made to the executors, not to the trustees. It is therefore premature at least, as it appears that the estate has not yet been settled by the executors and turned over to the trustees, with whom plaintiff in error would deal if his claim were valid.

But in the opinion of this court the probate court was right in dividing that Orville N. DuBrul has no interest in the estate of his father Napoleon DuBrul by the terms of his will, and for that reason he is not entitled as a matter of right to be furnished such a statement or to examine such books. Although the language of Item III is sufficiently broad to apply to any of the five sons including Orville, the trustees would not under its terms be justified in making any advancement to him because they would be required to charge the amount so advanced to his distributive share of the estate. Orville has no such distributive share, and they have no authority to make any such charge against that of his wife and children who take the one-fifth part which might otherwise have gone to him.

Plaintiff in error has no interest in the estate of Napoleon DuBrul, and the judgment is therefore affirmed.

Judgment affirmed.

GORMAN and HAMILTON, JJ., concur.

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**PAYMENT OF PROFESSORS OF LOSS IN SALARY FROM ENTERING
THE MILITARY SERVICE.**

Court of Appeals for Hamilton County.

GEORGE CARREL, AUDITOR, ET AL V. STATE OF OHIO, ON THE RELATION OF SANFORD BROWN ET AL, DIRECTORS OF THE UNIVERSITY OF CINCINNATI.

Decided, June, 1919.

Trust Funds—Where for Purposes of Education Laws Relating to Will be Liberally Construed—Discretion of Trustees in Expenditure of, Will Not be Interfered with in the Absence of a Showing of Abuse—Facts and Conditions Existing at the Time Should Guide in the Matter of Expenditures.

1. The directors of the University of Cincinnati have the discretionary power under the wills of Charles McMicken and Matthew Thoms, to pay from the trust funds thereby given, to professors and instructors of the University who entered the military service of the United States in the war with Germany, such amounts as would make up the difference between their regular salaries and the compensation paid by the Government.
2. Gifts in trust for the purposes of education are within the rules governing charitable trusts and are liberally construed.
3. Courts will not interfere with or control the discretionary application of funds by trustees in such a trust, except to prevent abuse or misuse. Such question is not properly raised in an action in mandamus.
4. The propriety of expenditures to carry on a university must be determined in view of the facts and conditions that exist at the time.

D. J. Ryan and Oliver M. Dock, Assistant City Solicitors, for plaintiffs in error.

Rufus B. Smith, O. J. Renner and Sanford Brown, contra.

SHOHL, P. J.

On April 30th, 1917, shortly after the declaration by the United States of a state of war against the Imperial German Government, the directors of the University of Cincinnati adopted the following resolution which was communicated to all the pro-

fessors, instructors, officers and other employees of the University:

"Resolved, That all professors, instructors, officers and other employees of the University who enlist or are drafted in the army, navy, medical or hospital service of the United States or in recognized training camps of the United States who are now permanently employed for next year be assured that their positions will be held for them and that they will receive compensation out of the trust funds under our control at regular times in such amount as will make up the difference between the army, navy, hospital or other service pay and the regular salaries in this institution."

At that time a substantial number of professors and instructors had already entered the military service and others were about to do so. A list of the names with the amount of compensation due to each of the members of the teaching force under the resolution was certified in 1918 by the directors of the University to the civil service commission and by them transmitted to the auditor of Cincinnati. Under the direction of an examiner in the office of the auditor of state, the city auditor refused to draw his warrant on the treasurer to make the payments called for by the list unless ordered to do so by the courts. The directors of the University thereupon brought this action in mandamus against the auditor and treasurer of Cincinnati, and the court of Common Pleas, after a trial, rendered judgment against the defendants and ordered a peremptory writ of mandamus to issue, directing the drawing and the payment of the warrant. The city auditor and city treasurer prosecute error to this court.

The refusal of the city officials to pay the professors and instructors is based upon the contention that it constitutes a payment of public money as a gratuity or donation and that the board of directors are exceeding their powers in attempting to use funds for such purpose. They cite *State ex rel Barker v. Philbrick*, 13 O. D., 158, and *Steubenville v. Culp*, 38 O. S., 18.

In the first case, certain sanitary employees were laid off temporarily, and, in the latter case, a police officer was suspended from duty. In both cases it was adjudged that no compensation

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could be recovered by the complainants as they were not rendering services to the city. In the case at bar, however, the resolution does not call for the payment out of money received from taxation. The disbursements are to be from trust funds. The record establishes that in addition to the funds raised by taxation, the board has an income from certain trust funds, among which are the McMicken fund and the Thoms fund.

Under the will of Charles McMicken a large amount of property was left for the purpose of establishing a college or university. Item 21 provides:

“Item XXI: I therefore devise, and bequeath to the city of Cincinnati and its successors for the purpose of building, establishing and maintaining, as soon as practicable after my decease, two colleges for the education of white boys and girls, all the following real and personal estate in trust forever.”

“Item XXXVII: The establishment of the regulations necessary to carry out the objects of my endowment I leave to the wisdom and discretion of the corporate authorities of the city of Cincinnati who shall have power to appoint directors of said institution.”

The income from the McMicken estate thus devised amounts approximately to \$28,000 annually.

Matthew Thoms, after certain other bequests, left the rest, residue and remainder of his estate as follows:

“Item III. All the rest, residue and remainder of my estate, real and personal, wheresoever situate, of which I may die seized, I give and devise to the City of Cincinnati, in trust for the University of Cincinnati, upon condition that out of the same there be set apart and provided a sufficient sum as the endowment of a professorship, to be called in memory of my father ‘The William Thoms Professorship,’ and the residue, if any, of the property given, shall be applied to such uses and purposes of said university as the directors thereof may from time to time provide.”

The income from the Thoms estate, in excess of the amount required for the William Thoms professorship, amounts to approximately \$6,000 annually.

All the powers granted by these bequests are vested in the board of directors under Sections 7902 and 7915 of the General

Code. Under the wills the disbursements of the money is left to the "wisdom and discretion of the board" in the one case, and it is to be "applied to such uses as the directors may provide" in the other. The directors justify the expenditure, in accordance with the resolution, on the ground that in a proper aspect and under a broad view, it promotes the purposes and objects of the donors and tends to further the success of the University of Cincinnati. If so, it comes within the discretionary powers granted to them.

The vital force of a university is its teaching body. No matter how fine the buildings, equipment and appointments devoted to the university purposes may be, the ultimate achievement of the university is accomplished by its staff of teachers. The establishment of a staff of professors in a university and the welding of all into a unit is a slow growth. The number of teachers who are the most competent and desirable is necessarily limited. In securing professors and instructors and in retaining them, the University of Cincinnati comes into competition with the other institutions of learning throughout the country.

The uncontradicted evidence shows that the policy of paying the professors and instructors of universities, who entered the war service of the United States, the difference between the amount paid them at the University and the amount received from the government has been so generally followed in the universities and other institutions of learning, that it may fairly be said to be the generally accepted policy in the country. While the professors and instructors had no contractual obligation to resume their positions after the war, it was hoped that they would do so, and the directors knew that the continuing payments would operate in fact to bind them to the University. The action of the directors in adopting the resolution was taken because in the judgment of the directors it was advisable to maintain the reputation of the University in the educational world and thus make it an institution which would attract to its faculty men of high standing, to make certain the continuance with the University after the war of the services of those professors and instructors who had enlisted for the war, and to continue the

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good will of the citizens of Cincinnati who had from time to time made gifts to the institution. Had the University declined to follow the accepted and prevailing policy, there might well have been a feeling among the members of the teaching body that the University was lacking in appreciation of its members, as well as in patriotism for the country, and it might have impaired the standing and reputation of the University with the teachers whom it sought to attract.

The trusts under the wills mentioned, being given for the purpose of education, are within the rules governing charitable trusts. *Zanesville Canal & Mfg. Co. v. Zanesville*, 20 Ohio 483, 488; *Russell v. Allen*, 107 U. S., 163, 172; *Perry on Trusts*, Section 700; *Dexter v. President and Fellows of Harvard College*, 176 Mass., 192; *Rockwell v. Blaney*, 9 N. P. N. S., 495 *et cit.*

Courts are liberal in the construction of powers of trustees of charitable trusts. *Zanesville Canal & Mfg. Co. v. Zanesville*, *supra*; *Mills v. Newberry*, 112 Ill., 123; *Ingraham v. Ingraham*, 169 Ill., 432, 450; 3 Story Equity, 14th Ed., Section 1550.

While courts in proper proceedings will restrain trustees from dealing with trust funds in a manner not authorized by law, they will not interfere with the discretion of the trustees in a charitable trust and will not control their discretionary application of the funds, except to prevent abuse or misuse. *Perry on Trusts*, Section 511; *Attorney-General v. Moore*, 19 N. J., Eq., 503, 507; *Attorney-General v. Wallace*, 46 Ky., 611, 620; see *Hunt, Trustee, v. Edgerton*, 9 C.C.(N.S.), 353. Affirmed 75 O. S. 594.

Moreover, an action in mandamus does not raise such questions. See *Bannon v. Board of Education*, 17 O. L. R., 47; *State ex rel Clarke v. Board of Education*, decision by this court, Clinton county, May 26, 1919.

Just what expenditures are suitable and necessary to carry on a university must be determined in view of the facts and conditions that exist at the time. *Cincinnati v. Jones*, 28 C. C. 210. Under the circumstances it can not be said that the money in question was not devoted to the uses and purposes of the University. The resolution was designed to promote the objects

of the donors of the trust funds, and the payments therein provided for should be made.

Judgment affirmed.

HAMILTON and CUSHING, JJ., concur.

COMPENTATION FOR IMPAIRMENT OF EARNING CAPACITY.

Court of Appeals for Cuyahoga County.

JOHN DI CICCIO, PLAINTIFF IN ERROR, v. THE INDUSTRIAL
COMMISSION OF OHIO, DEFENDANT IN ERROR.

Decided, June 27, 1919.

Workmen's Compensation—Not Invariable Where for Impairment of Earning Capacity—Injured Man Entitled to the Benefits of Improved Conditions—"Benefits" and "Compensation" Distinguished.

Where an injured employee is receiving compensation under the workmen's compensation act on account of impairment of his earning capacity, the Industrial Commission is not justified in determining that such impairment has ceased merely because his earnings are again equal to those received by him before his injury, where the fact that he is now receiving as high wages as formerly is due to the great increase in the scale of wages and were it not for his injury he would now be receiving much higher wages than were paid to him before his injury.

Gilbert Morgan, for plaintiff in error.

E. A. Baskin, contra.

WASHBURN, J.

Plaintiff, John Di Cicco, appealed to the common pleas court of Cuyahoga county from a decision or order of the Industrial Commission of Ohio, said to have been made on May 22nd, 1918, denying him the right to continue to participate in the industrial insurance fund of the state of Ohio.

A jury was sworn, but the case was tried on statements of counsel, one question only being submitted to and determined by the

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court, which directed a verdict for the defendant, and that controlling question was: Where an injured employee is receiving a compensation under the workmen's compensation act on account of impairment of earning capacity, is the Industrial Commission justified in determining that such impairment ceases when the employee succeeds in earning as much as he was earning at the time of his injury, although such success is due to an abnormal increase in wages and when it is admitted that but for such injury he would earn twice as much as he was able to earn in his injured condition?

In other words, if his actual earnings are compared with his earnings at the time of injury, then his earning capacity is not impaired, but if his actual earnings are compared with what he could earn if he had not been injured, then his earning capacity is still impaired. General Code Section 1465-80, which entitles him to compensation, provides as follows:

"In case of injury resulting in partial disability, the employee shall receive 66 2-3 per cent. of the impairment of his earning capacity during the continuance thereof, not exceeding a maximum of twelve dollars per week, or a greater sum in the aggregate than thirty-seven hundred and fifty dollars."

It is contended that plaintiff's earning capacity, but for the injury, is fixed by his average weekly wage at the time of injury and is not variable, and that as soon after the injury as he is again able to earn the same wages, there is then no impairment of his earning capacity; that the standard of comparison is money without reference to its increased or decreased purchasing value, and that the Commission can not take into consideration any enhancement in his earning capacity due to natural conditions such as his becoming older or more experienced, or the fact that owing to changed industrial conditions he could, but for the injury, earn much more than he was earning at the time of his injury, or any other circumstance which accounts for an increase in his earning power in spite of the handicap of his injury.

This seeming unjust conclusion is based upon the provisions of Section 1465-48, which provides that

"The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the *benefits*."

It seems plain to us that this section has no application to a case of an award of *compensation*.

In the workmen's compensation law a very clear distinction is made between "compensation" and "benefits." The statutes provide for the payment of money in case of death, and the payment in such case is spoken of as "benefits." General Code Section 1465-82 and General Code Section 1465-83. Other sections of the statutes refer to money paid to the injured employees who do not die of their injuries, and in such cases the payment is spoken of as "compensation." General Code, Sections 1465-76, 1465-79, 1465-80, and 1465-81. In the former class of cases,—benefits—Sections 1465-84 applies and the award is on the fixed basis of the average weekly wage at the time of the injury.

In the later class of cases—compensation—the basis is not fixed and invariable. One circumstance which may vary the basis in compensation cases is provided for in General Code, Section 1465-85, which is as follows:

"It (If) it is established that the injured employee was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage."

This distinction between "benefits" and compensation" is further shown by the amendment of Section 1463-87. That section provided for commutation of "benefits" and was amended to provide for commutation of "compensation" or "benefits." No other change was made by this amendment except the word "Commission" in the place of the word "Board," made necessary by a change of duties from a Board to a Commission.

That the basis in "compensation" cases was not intended to be fixed and invariable, is apparent not only from the specific provisions of Section 1465-85, quoted above, but the very object and purpose of the law is to make good to the injured employee, a

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certain proportion of the loss he suffers in his earning power by the handicap of his injury; the use of the term earning "capacity" indicates that; his "capacity" can not be ascertained without taking into consideration the conditions surrounding him, nor can it be ascertained whether or not his earning capacity has been impaired without taking into consideration what he could earn under those conditions if he was not in a crippled or injured condition.

Moreover, the income of the Industrial Commission is based upon the payroll of the state for six month periods and varies with the increase or decrease of wages, and the Commission is authorized to make awards for compensation for impairment of earning capacity for short periods of time, and has a continuing jurisdiction and great power and a wide latitude in fixing compensation. It can safely carry out the spirit and intent of the law and compensate for real loss of "capacity" to earn.

Where a real and substantial injury prevents an employee from earning what he could have earned if he had not been injured, his earning capacity has been impaired; a fund has been provided to compensate him for that loss, and his common law rights having been taken away, he is entitled to a liberal construction of the law which is said to have been passed for his special benefit.

The courts can not control or supervise the awards of the Commission, but the law does provide that when the Commission denies the right of a claimant to participate in the fund, or "to continue to participate in such fund," he may appeal to the court to determine whether or not he has such right. That was done in this case, and while the record is very unsatisfactory, it does show that the plaintiff was refused the right to continue to participate in the fund because of an interpretation of the law which we hold to be erroneous.

There is a hint in the rather loose statement of counsel, to the effect that there was a commutation of plaintiff's compensation, which possibly precludes him from an appeal, but the answer raises no such issue, and the suggestion in the statements is not definite enough to enable a court to pass upon that question, and

moreover it was not presented to the court, both parties desiring a ruling upon the interpretation of the statutes upon the question of earning capacity. Where an injured employee has been a participant in the fund, and continued participation is denied him, a general denial only to his petition on appeal is not fair to him nor the court. What has occurred and is a matter of record should be admitted if plead, and if not plead and it constitutes a defense, it should be set forth in the answer.

For error in rendering judgment against plaintiff, the judgment is reversed and the cause remanded.

DUNLAP, P. J., and VICKERY, J., concur.

BOY KILLED BY ELECTRIC CURRENT.

Court of Appeals for Richland County.

JAMES B. JESSON, ADMINISTRATOR, PLAINTIFF IN ERROR, v. THE MANSFIELD RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

Decided, 1917.

Negligence—High Degree of Care Required in Handling Electricity—But Electric Companies are not Insurers of Persons who Come in Contact with Charged Wires through Their Own Fault—Trespassers Without Recourse if Shocked.

Actionable negligence is not shown on the part of an electric light and power company in the case of a boy who was a trespasser and was found dead at the foot of a pole upon which wires charged with electricity had been strung by the company under permission of the municipal authorities.

L. H. Bean and W. S. Kerr for plaintiff in error.
McBride & Wolfe, contra.

POWELL, J.

This is an action for damages for the wrongful death of John Jesson, deceased, alleged to have been occasioned by the negligent

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and wrongful acts of the defendant, which are fully set out in the petition. The answer for a first defense admits a number of facts alleged in the petition, and denies all others, and is in legal effect a general denial of the negligence alleged and of the material allegations of the petitions. For a second defense it is alleged that the injuries which caused the death of said decedent were received by him wholly through his own fault and negligence contributing thereto and without fault or negligence on the part of defendant. A reply is filed which denies each and every allegation of the second defense of the answer. Upon the issues thus joined a trial was had resulting in a verdict for the defendant. A motion for a new trial was filed and overruled and a bill of exceptions was taken, containing all the testimony and the charge of the court, and the case is now before this court on a petition in error.

There are six assignments of error in the petition in error, mostly of a general nature, and which raise the contention that upon the pleadings and evidence the verdict should have been for the plaintiff instead of for the defendant.

We have examined the testimony carefully with reference to each of the errors assigned and find that there is no error apparent on the record prejudicial to the rights of the plaintiff in error.

The decedent was a boy 14 years of age and was found dead at the foot of one of the poles of the defendant at the time named in the petition, and the evidence is to the effect that his death was caused by electric shock. The claim is made that defendant was guilty of negligence in having an appliance that could conduct a dangerous current of electricity from its overhead wires to the street, and in not keeping its wires and other appliances so insulated and guarded that the current could not escape to the street.

It is settled law that a very high degree of care is called for in the handling and use of electricity and other dangerous substances and agencies, but those owning and using the same are not insurers of those who may come in contact with such substances by accident or otherwise. The testimony in this case

does not disclose any necessity whatever for a contact with a charged wire or chain on the part of decedent. He was not in the employ of the defendant nor under any contractual relations with it, and the defendant owed him no other duty than it owed to the general public, viz: that it should use a high degree of care to prevent persons coming in contact with its wires or other appliances carrying an electric current to their injury.

It is not every act of negligence that is actionable. Actionable negligence arises from a breach of legal duty arising out of contract or otherwise owing to the person sustaining the injury or loss. Thompson on Negligence, Section 801.

The defendant had its wires suspended where they were by permission of the municipal authorities of the city of Mansfield. We can not say as a matter of law that the evidence discloses it was guilty of any negligence whatever. The jury has said that as a matter of fact it was not, and we can not say from the record that there was error in so finding. The contact of decedent with the charged wire or chain was voluntary and unnecessary, and we think the evidence fairly shows that decedent was a trespasser against the defendant's property when he met with his unfortunate accident, and that if he had not been such trespasser, the same would not have occurred.

Upon the whole case the court is of the opinion that there is sufficient evidence in the record to sustain the verdict returned by the jury and the judgment rendered thereon; that the same is not contrary to law; that there is no manifest error shown by the record either in the admission or exclusion of evidence; that there is no error prejudicial to the rights of plaintiff in error in the charge of the court as given, or in the refusal to charge as requested. We find no error in the record which would justify us, as a reviewing court, in reversing the judgment of the trial court, and the same will therefore be affirmed.

Judgment affirmed.

SHIELDS and HOUCK, JJ., concur.

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TIME OF ACCRUAL OF AN ACTION FOR MALPRACTICE.

Court of Appeals for Cuyahoga County.

**E. C. HORNE, PLAINTIFF IN ERROR, V. CASIEMIEJA PAWLICKI,
DEFENDANT IN ERROR.**

(Judges Powell, Houck and Shields of the Fifth District sitting in
the place of Judges Meals, Grant and Carpenter of the
Eighth District.)

Decided, March 18, 1918.

*Physician and Surgeon—Malpractice Alleged in Failure to Remove
Drainage Tube—When Cause of Action Accrued—Charge of Court.*

In an action for malpractice in the performance of a surgical operation, where the negligence charged was in leaving a piece of gauze or drainage tube in the incision at the time the stitches were taken out, necessitating a second operation for removal of the gauze after a period of great suffering on the part of the patient, the cause of action accrued at the time of the alleged negligence in failing to remove the gauze and not at the time the first operation was performed, and an action for damages is not barred by the statute of limitations because not filed within one year from the date of the operation, where the filing occurred within a year from the date of the alleged negligence in failing to remove the gauze.

*Bentley, McChrystal & Biggs for Plaintiff in Error.
David & Heald contra.*

HOUCK, J.

This case comes into this court on error from the court of common pleas of this county. The parties here stand in the reverse order from where they stood in the court below.

The plaintiff below in her petition in substance says: that prior to the 6th day of September, 1915, she was suffering ill-health and, in his professional capacity, she called upon said defendant who advised an operation for ovarian troubles, and that on September 6th, 1915, said defendant performed upon her a surgical operation to relieve said trouble. She further

avers in her petition that after said operation was performed upon her said defendant inserted in the incision made by him upon her a piece of gauze commonly known as a drainage tube, which said gauze was by said defendant permitted to remain in said incision and said incision was healed up without said gauze having been removed from said incision. Plaintiff further averred in her petition that as a result of said gauze having been negligently and carelessly permitted to remain in said incision by said defendant and same having healed up caused her great pain and suffering from the time she left the hospital where said operation was performed until July 12th, 1916, when a second operation was performed for the purpose of removing said gauze. The petitioner further averred that as a result of said negligent and careless acts of said defendant she became thin, pale, weak, unable to eat regularly, suffered at night until she could not sleep, was bent over, and in the region of said incision she suffered terrible and excruciating pain, all to her great damages in the sum of \$5,000, and for which she prayed judgment.

To this petition the defendant filed an answer consisting of two defenses. The first defense, after making certain admissions as to the defendant being a physician and surgeon, avers that in the summer of 1915 the plaintiff was afflicted with ailments which required or justified a surgical operation to relieve her and that he was employed to perform said operation, and that he did duly perform the same upon the plaintiff on the 30th day of August, 1915, and at no time thereafter; and that after said operation the incision in the plaintiff's body therein made healed up and the defendant denies each and every other allegation in said petition contained which is not expressly admitted therein. In the second defense the defendant says that he performed said operation on the plaintiff and fully completed the same on and not after the 30th day of August, 1915, and that any negligence or want of proper care of which the defendant might be shown to have been guilty—though he denies that he was guilty thereof—occurred at the time of said operation and more than one year before the filing of said petition, and

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the defendant says that the alleged cause of action of the plaintiff is for malpractice on the part of the defendant in and about said operation and that said cause of action did not accrue within one year next before the filing of said petition and that the same is barred by the statute of limitations of the state of Ohio, and prays to be dismissed with his costs.

To this answer a reply was filed by the plaintiff, the same being in the nature of a general denial.

Upon the issues thus raised by these pleadings the case was submitted to a jury upon the evidence and a verdict was returned in favor of the plaintiff in the sum of \$2,250. A motion was filed for a new trial, heard and overruled and a judgment was entered on the verdict by the trial court.

An examination of the petition in error discloses that many alleged errors are set forth therein in which it is sought to reverse the judgment below. However, in oral argument counsel for plaintiff in error urged but three grounds of alleged error, namely, that the cause of action stated in the petition was barred by the statute of limitations; second, that the court erred in its refusal to give in its charge to the jury certain instructions duly requested by defendant and which requests were made in writing; and, third, that the court erred in its general charge to the jury.

We have examined the bill of exceptions and the entire record in this case with much care to ascertain whether or not the claims made by counsel for plaintiff in error or any of them are well taken.

Coming now to the question as to whether or not the cause of action was barred by the statute of limitations, we find from the record in this case that the operation in question was performed on the 30th day of August, 1915; that the petition in this case was filed on the 5th day of September, 1916. We further find from the evidence that the piece of gauze in question, which was inserted in said incision by the defendant below at the time of making same, and which was not removed at the time the stitches were removed from said wound some two weeks after the operation was performed, and which gauze according to

proper surgery, as shown by the evidence, should have been removed at that time, and which to us was the cause of the mischief, and the failure to remove said gauze is charged in plaintiff's petition as negligence. It therefore follows that the date of the cause of action arose at least two weeks later than the date of the operation. We, therefore, find as a matter of fact and law that the cause of action arose about the 12th day of September, 1915, and that plaintiff's action was not barred by the statute of limitations at the time the petition was filed.

The alleged error as to the statute of limitations is therefore not well taken.

Learned counsel for plaintiff in error insist that the trial judge erred in his refusal to give in charge to the jury certain instructions in writing which were requested by the defendant below. We have examined all of these requests and while some of them are sound as abstract propositions of law, yet we find none of those refused to be applicable to the issues raised by the pleadings or the proven facts in the case, and therefore we find no prejudicial error in the refusal of the court to give such charges.

It is urged by plaintiff in error that the general charge to the jury as given by the trial judge was erroneous in that he failed to properly charge the jury upon the question as to the statute of limitations. We do not deem it necessary to discuss this question further than to say that we find the claim of plaintiff in error in this regard not well taken. We have no hesitancy in saying that in some particulars the charge was not as clear and specific as it might have been; but in substance and in fact it covered every proposition necessary to be charged with reference to the issues raised by the pleadings and the established facts.

Finding no prejudicial error in the record that would warrant or justify a reviewing court to reverse the judgment in this case, the same will be affirmed. Judgment affirmed.

POWELL, J., and SHIELDS, J., concur.

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**LIABILITY FOR THE DEBT OF ONE OF THE COMPANIES OF
A MERGED CORPORATION.**

Court of Appeals for Cuyahoga County.

(Judges of the First Appellate District sitting in place of the Judges
of the Eighth Appellate District.)

**THE BRUCE-MACBETH ENGINE CO. v. J. P. EUSTIS
MANUFACTURING CO.***

Decided, June 28, 1917.

*Corporations—Merger by Contract—Liability for Debt of Constituent
Company—Waiver of Jury—Effect of Dismissal of all the Defend-
ants Except One—Election between Remedies—Time of Filing
Petition in Error.*

1. Where two journal entries are shown by a transcript, the first being in form merely a finding in favor of the plaintiff and a fixing of the amount of damages and the second disposing of a motion for a new trial and in its terms a formal judgment entry in all respects except that it does not contain the amount to be recovered, the second entry is the judgment entry from which the filing of the petition in error must date.
2. Where the prayer of a petition is for a money judgment only as against one defendant with an alternative prayer for equitable relief against the other defendants and the defendant against whom a money judgment is sought waives a jury, such defendant can not thereafter withdraw the waiver of a jury and insist upon a jury trial merely because the court dismisses the other defendants from the case.
3. Where the undoubted purpose of a contract between two corporations is to merge the two corporations into one, practically making as complete a merger as an actual statutory consolidation would have done, the new company is liable for the payment of a debt of one of the merged companies, although the contract in some of its terms savors of a sale and does not comply in all respects with the requirements of a statutory consolidation.

*Motion for an order requiring the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 11, 1917.

4. A party is required to elect only when two or more inconsistent remedial rights are given by law upon the same state of facts.
5. A review by a proceeding in error of the action of a court in dismissing certain defendants from a case does not serve to delay or prevent either the continuance of the trial and a judgment against a defendant not dismissed or a review of such judgment by error proceedings.

Gage, Day, Wilkin & Wachner, Tolles, Hogsett, Ginn & Morley and White, Johnson, Cannon & Neff, for plaintiff in error.

Hoyt, Dustin, Kelley, McKeehan & Andrews, I. L. Evans and Frank O. White, contra.

JONES, P. J.

Error to Common Pleas Court of Cuyahoga County.

The foundation of this action is based upon a contract dated September 11, 1905, by the terms of which the J. P. Eustis Manufacturing Company, hereinafter called plaintiff, was given the right to sell in certain territory engines manufactured by The Bruce-Meriam-Abbott Company, hereinafter called the engine company.

Under this contract plaintiff sold an engine to the Saco Brick Company, which was warranted to develop a certain guaranteed horsepower. In January, 1907, the Saco Brick Company sued plaintiff in the courts of Massachusetts for damages by reason of the failure of the engine sold to it to deliver the guaranteed horsepower. Notice of this suit was given to the engine company, which company assisted in securing testimony for the defense, and was advised of the progress of the case, which was hotly contested. After a considerable time judgment was obtained against the J. P. Eustis Manufacturing Company by the Saco Brick Company, and execution was issued upon said judgment in May, 1911, and plaintiff was compelled to and did pay the judgment.

In December, 1913, plaintiff brought an action against the engine company in the court of common pleas of Cuyahoga county, Ohio, to reimburse it for the damages sustained by the payment of the judgment of the Saco Brick Company. This action resulted in a judgment, on November 14, 1914, in favor

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of plaintiff, which was carried to the court of appeals and was there affirmed. Execution was issued upon said judgment, and October 13, 1915, a return of *nulla bona* was made thereon.

The action now before the court was then commenced in December, 1915, to recover the amount of said judgment against the engine company which it had failed to collect on execution. In this case were joined as parties defendant The Bruce-Meriam-Abbott Company, called the engine company, and its directors and stockholders, together with the personal representatives of the deceased stockholders of said company, and The Bruce-MacBeth Company, hereinafter called "the new company."

The case was tried on the amended petition, in which it is alleged that on or about April 29, 1909, the engine company and The MacBeth Iron Company, called "the iron company," with the consent and approval of the directors and stockholders of each of said companies, entered into a contract "for the purpose among other things of combining the business and property of said two companies;" that all the property, assets and effects of the two companies were to be appraised and the values fixed; that the engine company was to transfer and assign to the iron company all its assets of every kind and description whatsoever, except the lease-hold of a small building thereon; that the engine company was to list all of its debts and liabilities, and that all of the debts and liabilities so listed were to be paid by the iron company; and that the directors of the engine company guaranteed that the liabilities of said company would not exceed the sum so listed, and that they would hold harmless the iron company from any liabilities in addition to those listed. Said agreement further provided that the engine company should be dissolved; that the iron company should change its name to The Bruce-MacBeth Engine Company and if necessary increase its capital stock; and that both companies would list their assets and liabilities and would issue stock to the stockholders of the engine company *pro rata* to represent the net assets of the engine company. The amended petition alleges that this transfer of property was carried out and that

the new company thus obtained net assets of said engine company to the value of \$68,326; that certificates for three hundred and forty-one shares of stock were issued to the stockholders of the engine company to represent said amount, and the cash balance of \$126 was distributed among the stockholders in lieu of fractional shares; and that the engine company was left without any assets with which to pay its debts and particularly the debt of plaintiff. Then the following allegations were made:

“Plaintiff further alleges that by reason of the acts, transactions and proceedings of the defendants (except Walter S. Bowler), as herein set forth, said The Bruce-MacBeth Engine Company became, and is legally obligated and bound to pay all the debts, obligations and liabilities of said The Bruce-Meriam-Abbott Company, including the aforesaid claim of this plaintiff.

“If, however, it should be found by the Court that said The Bruce-MacBeth Engine Company did not become so obligated and bound to pay the aforesaid claim of this plaintiff, by reason of the premises, then plaintiff alleges that said acts, transactions and proceedings have hindered, delayed and defrauded it in the collection of its aforesaid claim against said The Bruce-Meriam-Abbott Company, and that by reason thereof, it has been prevented from collecting the same. That the aforesaid transfer and conveyance of its property was made by The Bruce-Meriam-Abbott Company with the intention of hindering, delaying and defrauding its creditors, and particularly this plaintiff, in the collection of their claims, debts, obligations and liabilities against it.”

The amended petition prayed for a judgment against defendant, The Bruce-MacBeth Engine Company, in the sum of \$4,845.12, with interest; and, in the event the court should refuse this judgment, prayed in the alternative for a judgment against the other defendants, and that the transfer of the assets of said company be declared null and void and that they be taken over and administered for the benefit of the creditors of said company; and for general relief.

The case was tried to the court, and in the progress of the trial the court being called upon to construe the contract found

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that the terms of the contract would require the payment of the debts of the engine company by the new company, and thereupon dismissed the individual directors and stockholders and their personal representatives from the case, and allowed plaintiff to proceed as against the new company, which company was then permitted to file an amended answer in which it set up as an additional defense that the plaintiff, having elected to pursue the engine company and secure a judgment against it, was conclusively barred from proceeding against the new company. The new company at that stage filed a motion for a jury trial, which was refused by the court because a jury had been waived by the new company at the commencement of the trial.

The case proceeded, and judgment was finally rendered against the new company in the amount claimed.

Error proceedings are prosecuted here to reverse that judgment.

A preliminary question is raised by the defendant in error by a motion to dismiss the petition in error on the ground that it was not filed within the time provided by law. It is contended by defendant in error upon this motion that the judgment of the court below was entered September 22, 1916, while plaintiff in error contends that the judgment to which error is prosecuted was entered October 19, 1916.

The journal entries shown by the transcript in this case are as follows:

“September 22, 1916. The parties by their attorneys come, waive a jury and submit this cause to the court on the pleadings and evidence; on consideration whereof the courts finds for the plaintiff against the defendant, The Bruce-MacBeth Engine Company, and assesses its damages in the sum of \$5,426.53. To which the defendant excepts.”

Motion for new trial was filed September 25, 1916, by defendant and on the same day a motion was filed by the defendant to set aside judgment. These motions were overruled, and the following entry was placed on the journal October 19, 1916:

“The motion by the defendant The Bruce-MacBeth Engine Company for a new trial of this case, is heard and overruled, to which the said defendant excepts. It is therefore considered that the said plaintiff recover of the said defendant its said damages and also its costs of this suit. Judgment is rendered against the said defendant for the costs herein. Record waived.”

On November 2, 1916, the following entry was made upon the journal:

“The motion by the defendants for a new trial of this cause, is heard and overruled. To which ruling the defendants except. It is therefore considered that said plaintiff recover of said defendant its said damages and also its costs of this suit. Judgment is rendered against the defendants for the costs herein.”

It is apparent to the court that the entry of November 2, 1916, which is practically the same as that of October 19, was made by inadvertence and need not be further considered, as the entry of October 19 had disposed of the motion for a new trial, and in its terms is a formal judgment entry in all respects except that it does not contain the amount to be recovered, as is customary in such entries. By reference, however, to the previous entry of September 22 this amount is made certain. In its form the entry of September 22 is merely a finding in favor of the plaintiff and a fixing of the amount of damages.

Upon consideration of these entries of both September 22 and October 19, we hold that the first is not the judgment entry from which the filing of the petition in error must date, but that the entry of October 19 is such judgment entry, and that the petition in error was therefore filed within the statutory time and the motion to dismiss must be overruled.

The first and second points relied upon by plaintiff in error in seeking a reversal of the judgment below are: first, this action as it was originally instituted was one in equity and the court of common pleas had no authority or jurisdiction to transform it upon the court's own motion into an action at law against the new company alone; and, second, the new company

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was entitled to a trial by jury after the other defendants were dismissed from the case. We will treat these two points together.

There is no question, from the form of the petition, but that the action was primarily one for a money judgment against the new company, and, failing to secure that, in the alternative to hold the directors and stockholders of the engine company and reach its assets as a trust fund in the hands of the new company for the purpose of paying plaintiff's judgment. The action of the court in dismissing from the case the directors and stockholders of the engine company over the objection and exception of the plaintiff did not in any wise change the character of the action from one in equity to an action at law; it merely dropped out the equitable feature of the action, requiring plaintiff to stand alone upon his claim for a money judgment, which had been in the case from the commencement of the action.

By Section 11238, General Code, it is provided that there shall be but one form of action in this state, to be known as a civil action; and under Section 11305, General Code, plaintiff is required to set forth in his petition a statement of the facts constituting his cause of action, in ordinary and concise language, with a demand for the relief to which he claims to be entitled.

A distinction between actions at law and suits in equity has been abolished by the code, so far as relates to form or name, and what is called "a civil action" has been substituted. When the facts entitle the party to relief the mere form of the action is disregarded. *Chapman v. Lee*, 45 Ohio St., 356, 367, and *Raymond v. T., St. L. & K. C. Ry. Co.*, 57 Ohio St., 271.

The part of the amended petition above quoted shows that so far as this plaintiff in error, the new company, is concerned, the demand was for money only, both by the language of the allegations of the amended petition and by the form of prayer which demanded a money judgment. In this state of the pleadings, which was in no way modified by the later stages of the trial, at the commencement of the trial, counsel for the new

company in answer to inquiry from the court said the case was for trial by the court and not by a jury. We regard this as a clear waiver of a jury, in accordance with the terms of Section 11379, General Code. And there was nothing in the further progress of the trial, after the court had come to construe the contract and in a measure to pass upon the liability of the new company, to authorize or permit the new company to change its position and to withdraw the waiver of a jury and to insist upon a jury trial.

The third ground of error argued by plaintiff in error is that the court erred in its conclusion that by the terms of the contract between the engine company and the new company the new company assumed and agreed to pay the claim of the plaintiff against the engine company.

It is urged that the motion or merger between the engine company and the iron company was not a statutory consolidation. If it were, there is no question but that the new company would be liable for the payment of plaintiff's judgment as a debt of the engine company. *Boehmke v. Northern Ohio Trac. Co.*, 88 Ohio St., 156, 162.

The trial court in its opinion discusses the question of classification of this contract, and seems to be justified in its conclusion that it must be classed as a sort of nondescript. While in some of its terms it savors of a sale, and while it does not comply in all respects with the requirements of a statutory consolidation, still its undoubted purpose was to merge the two companies into one, continuing, it is true, the corporate existence of the iron company under a new name, but practically making as complete a merger as an actual statutory consolidation would have done. If this claim had been listed, no question whatever could have been made as to the liability of the new company. The contract required that all debts, obligations and liabilities should be listed, and that when so listed the new company should become liable for them and pay them. It recognized the fact that in some manner these assets could be reached to pay any obligation which through inadvertence or mistake was not included in the list of liabilities so prepared

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and guaranteed to be included in the contract, and made the directors and stockholders personally liable for any claim not so listed which the new company was required to pay.

Plaintiff in error, the new company, can not sustain its position that the transfer and conveyance of the assets of the engine company to it was a sale, carrying with it no obligations except those clearly expressed in the contract, for the reason that no consideration whatever was given by the new company to the engine company. The issue of stock in the new company, to the stockholders, was for no consideration to the company. The stockholders are not the corporation, nor do they represent it in its relation to its creditors. *Compton v. Railway Co.*, 45 Ohio St., 592, 615, and *McIver v. Young Hardware Co.*, 144 N. C., 478, 119 Am. St., 970.

“The assets of a corporation, including unpaid subscriptions to its capital stock, constitute a trust fund for the benefit of its creditors, which can not be disposed of by it, without consideration, or fraudulently, to the injury of such creditors.” *Niles, Assignee, v. Olszak*, 87 Ohio St., 229.

The record clearly shows that the conduct of the parties, including their catalogues and the literature as well as their correspondence and dealings, showed a recognition that the two companies had actually become merged into a new company.

In the case of *Andres v. Morgan, Trustee*, 62 Ohio St., 236, where the members of a partnership had incorporated for the purpose of continuing the business as a corporation, and had taken capital stock to correspond with the interests theretofore held in the partnership, transferring all the partnership property to the corporation, it was held that the debts of the partnership became the debts of the corporation, which was liable therefor. The opinion of the court in this case is instructive as illustrating how the law brushes aside the fiction of the legal entity, when no real change has taken place, and refuses to construe a transaction as a purchase where such construction would operate as a fraud upon the rights of creditors.

It is suggested in the brief of counsel for plaintiff in error that there could be no liability on the part of the new company

to plaintiff, because plaintiff was not a creditor of the engine company at the time its property was transferred to the new company. The obligation of the plaintiff to the Saco Brick Company arose at the time of the sale of the engine to it, and the obligation of the engine company arose at the same time by reason of its contract with plaintiff. *Boies v. Johnson*, 1 C. C. (N. S.), 451; *Jones v. Leeds*, 10 Ohio Dec., 173, and *Herrick v. Wardwell*, 58 Ohio St., 294, 309.

The fourth point claimed by plaintiff in error is that plaintiff made a conclusive election to hold the engine company alone for its debts, by proceeding against it, and that the action against the new company was therefore barred.

The party is required to elect only when two or more inconsistent remedial rights are given by the law upon the same state of facts. In *Becker v. Walworth*, 45 Ohio St., 169, the court, at page 173, used the following language:

“It may be said, as a deductoin from the authorities on the subject, that an election is the making of a choice between two or more benefits or rights which estops the party from afterwards denying that an election has been made, and from demanding some benefit or right other than the one chosen. Except in cases where his conduct has been such as to mislead another party to his prejudice, the party having a right to elect must have proceeded upon the idea that he was bound to elect; he must have had knowledge of his obligation to elect as matter of law; there must have been a *purpose* to elect, and an *actual* election. And where the election is as to one of two or more remedies, in order to make a selection of one a bar to a pursuit of the other, it must appear that they are inconsistent, and that the one last sought is not merely cummulative.”

There is no claim whatever in this case that the new company has been misled to its prejudice by the conduct of plaintiff, which seems to have been the basis of the decision in *Bohanan v. Pope*, 42 Me., 93, relied upon by plaintiff in error.

An election may be either as to the parties or as to the remedy. There can be no claim in this case that any election of parties has been had to the prejudice of the new company. Possibly such a question might have arisen as between the

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engine company and the plaintiff, the Saco Brick Company having an election as to which it might pursue—one being principal and the other agent—but that certainly does not obtain as between plaintiff and the new company.

Plaintiff in error urges that it may claim a benefit because of an election as to remedy, in that the plaintiff undertook to reach the assets of the engine company for the purpose of securing satisfaction of its judgment. Clearly such claim can not be made where, as in this case, the parties were brought into one suit and the prayer was in the alternative, and the court granting relief by way of money judgment dismissed out the parties by means of whom it was undertaken to reach the assets.

But it is useless here to discuss further the question of election, as the trial judge has gone fully into that question in the very able opinion rendered in this case, which meets with the approval of this court, and to which it is not necessary to make any addition.

As a fifth ground of error plaintiff in error challenges the jurisdiction of this in this proceeding in error, because plaintiff has seen fit by petition in error to undertake a review of the action of the trial court in dismissing the stockholders and directors.

So far as that proceeding in error is concerned, which is found as case No. 1515 on the dockets of this court, it was a final judgment, and it was clearly within the right of plaintiff in error to obtain a review of the action of the court in that matter, and so far as any claims plaintiff might have against the stockholders and directors are concerned it was necessary to proceed without allowing lapse of time to prevent a review of that portion of its case; but such review could not in any way delay or prevent the continuance of the trial and a judgment against the new company. And the pendency of the error proceedings does not in any way interfere with the jurisdiction of this court in this case.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

GORMAN and HAMILTON, JJ., concur.

VALIDITY OF THE PAY PATIENT LAW.

Court of Appeals for Knox County.

CLINTON M. RICE, AS GUARDIAN OF JOHN W. YOUNG, AN INSANE
PERSON, v. THE STATE OF OHIO.

Decided, December 18, 1918.

Constitutional Law—Classification of Persons—Not Violative of Constitutional Provisions, When—Requirement that Patients in Hospitals for the Insane Pay for their Support when Able so to do Not Unreasonable.

1. The mere fact that a statute is based on a classification, and in effect applies to some persons and not to others, does not render it invalid, where it operates uniformly on all persons in the same class and under similar conditions.
2. The General Assembly had full power and authority to enact what is known as the "pay-patient" law, applying to institutions for the care of the insane, and its enactment was purely a matter of public policy and peculiarly within the domain of the legislative branch of the government.

B. B. Ferenbaugh and D. H. Hyatt, for plaintiff in error.

Joseph McGee, Attorney General, *Charles L. Bermont*, Prosecuting Attorney, and *L. D. Johnson*, contra.

HOUCK, J.

Heard on error.

Question: Is the "pay patient law" of Ohio constitutional?

This action was brought in the court of common pleas of Knox county, Ohio, under favor of Sections 1815 to 1815-12, inclusive, of the General Code.

An answer was filed by the plaintiff in error, defendant below, which admitted the allegations of the petition, but set up the unconstitutionality of the law as a defense.

A general demurrer was interposed to this answer and the same was sustained.

An amended answer was then filed which contained three separate defenses. The first, after practically admitting all of the allegations of the petition, contained a general denial; the second setting up the defense that the ward was a pen-

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sioner, and that he had no means except what had been received as pension, and that plaintiff below was therefore unable to enforce the payment of its claim. The third defense set up the unconstitutionality of the law.

A general demurrer was then interposed to the second and third defenses of the amended answer and the same was sustained.

The case then went to trial to a jury upon the petition, the first defense in the amended answer, and the evidence, and after the evidence was adduced, the court directed the jury to return a verdict for the plaintiff below for the full amount of its claim, being the sum of \$397.06, for one hundred and thirteen weeks' support, at \$3.10 per week, and interest thereon, furnished John W. Young, an insane person, at the State Hospital for the Insane, at Columbus, Ohio.

A motion for a new trial was filed and overruled, and exceptions noted.

Counsel for plaintiff in error seek to reverse the judgment in this case upon the ground that the "pay patient law" is unconstitutional for the reason that it is in conflict with Section 26 of Article II, and Section 1 of Article VII, of the Constitution of Ohio.

The first is:

"All laws, of a general nature, shall have uniform operation throughout the state * * *."

The second is:

"Institutions for the benefit of the insane, blind, deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the General Assembly."

Do the requirements of this law operate uniformly throughout the state of Ohio? An examination of its provisions at once satisfies us that the answer must be, yes.

It will be conceded, we think, that the mere fact that a statute is based on a classification, and in effect applies to certain persons to the exclusion of others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions.

We hold that legislation, which in effect carries out a public purpose, and applies to a class or classes of unfortunate persons of our state, as the humane law now under consideration seeks to do, and which is limited in its application, if within the bounds of its operation it affects alike all persons similarly situated, is not within the prohibition of Ohio's Constitution.

It is necessary that such law must affect alike all persons in the same class and under similar conditions, the restriction being that the law must apply to all of a given class, and that individuals from such classes can not be excepted. It will be observed that individuals are not excepted from the provisions of the "pay patient law," but it applies to all persons who come within the class of insane, blind, etc.

The rule here laid down is well settled in Ohio, and is found in the second syllabus of the case of *Steele Co. v. Miller*, 92 O. S., page 115, which reads:

"A statute is general and uniform, within the requirements of the Constitution, if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness or because in practice it may result in some inequality."

Testing the "pay patient law" by the provisions of Section 2 of Article VII of our Constitution, will it stand or fall?

Counsel for plaintiff in error in their brief say:

"It would seem very clear that the Legislature derives its power from this provision of the Constitution to enact Section 1815, G. C., because it is in accordance with its provisions, but it is entirely without power to create in the law such exceptions as are contained in the sections that follow."

The admission made by learned counsel in the first part of the above statement is sound, but the latter part of same, in which it is claimed that subsequent sections of this law create exceptions making it unconstitutional, is not well taken. We reach this conclusion after a careful examination of all the sections of the act in question.

Counsel having conceded that this provision of the Constitution is not self-executing, and that in order to make it oper-

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ative it was necessary for the Legislature to act, which it has done, and having done so with proper discretion and within constitutional bounds, the law is effective.

The constitution makers of our state acted wisely and humanely when they provided for the fostering and support of institutions for the insane, blind, etc., and the Legislature of Ohio exemplified its humanitarian spirit when it passed the law now before us for consideration, and thereby provided for the maintenance, support and care of such unfortunate wards.

The necessity of having places for the restraint as well as for the care of insane persons will not be questioned. This is essential for all so afflicted, whether they be rich or poor. The state is bound to and does for the sake of society, the protection of the public, and for the personal welfare and safety of all such unfortunate persons, provide a place and suitable care for them, and our Legislature in its wisdom passed this "pay patient law" requiring such persons, if they have the means, and if not then certain of their relatives are required to pay for said support, an amount not to exceed \$3.50 per week. To us this is not an unreasonable requirement, and where the patient is able to pay, in part, for his support in a public institution, as is clearly evident in the present case, we feel the Legislature acted within its right, and possessed full power and authority to make the law now before us, and that its enactment was purely a matter of policy, which was to be determined by the enacting body, and that it does not come within any inhibition of the Constitution of Ohio.

We are unable to find, in law or sound morals, any reason why an insane person, if he possesses a sufficient amount of "this world's goods" to do so, should not, at least in part, contribute to the cost of his support, while confined in a public insane hospital, which is fostered by the state, and whereby it is sought to restore him to reason and return him to his family and loved ones, thus enabling him to again take his former place in community life.

Are the tax payers of our state to be compelled to pay entirely for the support of such persons, and they be excused from contributing thereto, although amply able to do so? This would

be in direct violation of what we hold the rule should be: that for one to become a proper subject to receive the benefits of public charity, he first must have reasonably exhausted all his own means for his support, and when this is done it clearly follows that such person, if he be insane, is entitled to care and support, while receiving treatment at a state hospital for the insane, and without legal claim that he should contribute to the expense of same.

It might be well to recall that every presumption is in favor of the validity of an act of the Legislature; and in determining as to whether or not a law is constitutional or unconstitutional, courts must and do presume in the beginning that it is constitutional. If the Constitution prescribes one rule, and the law another and different one, the law must and does fail, and should be declared void.

Courts also presume that the Legislature acted with integrity, using its best judgment, and with an honest purpose to keep within the restrictions and limitations prescribed by the Constitution.

Applying these rules to the case in hand the law now being attacked must stand.

The question for determination in the case at bar is an important one, and so far as we have been able to learn this is the first time it has been presented to a court of appeals in this state, and owing to its importance and far-reaching effect upon the unfortunate wards of Ohio's commonwealth, as well as every citizen within its confines, we have given it careful and laborious consideration, and it is the unanimous judgment of this court that the "pay patient law," as it now stands in Ohio, is constitutional, and is not repugnant to or in any way in conflict with the Constitution of our state.

We have examined all of the claimed errors, as set forth in the petition of plaintiff in error, and find none of them well taken. It follows that the judgment of the common pleas court must be affirmed.

Judgment affirmed.

POWELL, J., and SHIELDS, J., concur.

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RIGHTS UNDER A DEFECTIVELY EXECUTED LEASE.

Court of Appeals for Jefferson County.

THE REX AMUSEMENT COMPANY ET AL VS THOMAS A. NOLAN.

Decided, May 25, 1918.

Landlord and Tenant—Term of Lease—Restoration of Building.

1. Where possession is taken under a defectively executed lease or a lease void for any reason, fixing the period of tenancy at one or more years and the rentals are payable monthly, such lease creates a tenancy from month to month only.
2. Where a building, formerly used for a store room or rooms, is leased for the purpose of conducting a motion picture show, with the right and privilege of repairing and altering same to suit the purposes of the lessee for a moving picture theatre, and it is further provided that at the expiration of the lease the premises shall be surrendered in as good condition as they were in at the beginning of the term and just before the alterations were made, the lessee, upon surrender or expiration of his lease, is not required to restore the building to its former or original condition as a store room or rooms as it was at the beginning of his term; nor is he liable in damages for his failure so to do. He is only required by the terms of his contract to leave the building in as good condition as it was at the beginning of his term.

Ralph B. Cohen and Dio Rogers for plaintiffs in error.*Edward McKinley and E. Dewitt Erskine*, contra.

FARR, J.

On the 2d day of February, A. D. 1914, John Peters as agent for the Rex Amusement Company, entered into a lease or rental agreement in writing with Thomas A. and Mary E. Nolan for the rental of a two story brick building located at the corner of Fourth and Main Streets in the village of Toronto, this county.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November, 19, 1918.

The lease provided among other things that the term should be five years, beginning on the first day of March, 1914, and ending on the 28th day of February, 1919, and the rent agreed to be paid was the sum of \$2,100, payable fifteen dollars per month on the 1st day of each month during the first year of said term and forty dollars per month during the remainder of said term.

It is further provided in said lease that the premises should be surrendered to the lessor at the end of said term in as good condition as they were in at the beginning. It is conceded that the premises were leased for the purpose of conducting a motion picture show in the same, and it is provided with reference to alterations in the building, that the lessees should have "the right and privilege of repairing and altering same to suit the purposes of the lessees herein for a moving picture theater."

The Rex Amusement Company soon thereafter took possession of the premises and made certain alterations in the building and such alterations consisted, among other things, in removing a partition for which iron beams were substituted, a stairway was removed, the floor altered by lowering it at one end and the entrance to the building was changed.

Nolan did not rent the second story of the building to the Amusement Company, in which there were living rooms occupied by himself and family. Later the state authorities notified the Amusement Company that a picture show could not be conducted in the first story of a building where there were living apartments over the same occupied as a dwelling, unless there were fireproof walls and ceilings separating same in such manner as to make the building safe and suitable for occupancy as such.

The record further discloses that Nolan and his family moved out of the second story of the building and were out of same for a period of some months while the alterations were being made, and it is claimed that during the time that he did not occupy the rooms the Rex Amusement Company had, by a

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verbal agreement, agreed to pay his rental in another dwelling house.

After the completion of the alterations or improvements, it is disclosed that Nolan with his family returned and occupied the rooms over the picture show, when the state authorities again notified the Amusement Company that the building could not be utilized for a picture show unless the family removed from the upper story thereof, or unless the building was further improved or altered so that the living rooms would be safe for occupancy as such.

It is further disclosed that the Amusement Company closed its picture show in the building on the 24th day of April, 1917, and abandoned the premises, but paid the rentals before abandonment to the 1st day of May following. In December of 1917, Nolan began a suit in the Court of Common Pleas of this county; the petition contains four causes of action. In the first he seeks to recover the sum of \$360 for the amount of rentals accrued and claimed to be due at the expiration of the term and for the interim between the date of surrender or abandonment and the expiration of the year.

In the second cause of action he sets out the alterations made in the building by the Amusement Company to prepare and make it suitable for their use as a motion picture theater, and asks to recover the sum of \$979, which he alleges it will cost to restore the building to the same condition as store rooms as it was in before the alterations were made.

In the third cause of action he recites the order of the state authorities with reference to his removal from the living rooms over said picture show, and avers that by verbal agreement, the Amusement Company agreed to pay his rental in another building during the time the repairs or alterations were being made, and asks judgment in the sum of \$120 as reimbursement for the rentals so paid by him, and in the fourth cause of action he asks to be compensated for the destruction or removal of a stairway leading from the first to second floor and says that the cost of restoring the same would be twenty-five dollars.

To this petition the Rex Amusement Company filed an answer, and answering plaintiff's first cause of action, avers that it was required by an order of the state to close said picture show because Nolan, against its wish, moved back into the living rooms over the auditorium and that by no fault of its own, it was compelled to close its show and therefore denies all liability upon said cause of action for the remainder of the term from the time it surrendered possession until the expiration of the year.

For answer to the second cause of action, relating to the changes or alterations made in the building, it is averred that it made said changes and had a right so to do by the terms of its agreement, and it further avers that it left the premises in as good or better condition at the date of surrender than they were in at the time it took possession at the beginning of the term. And for answer to the third cause of action, it is averred that Nolan voluntarily agreed to remove from the rooms while the repairs were being made, and that it did not agree to reimburse him for the rentals which he paid for another dwelling house.

In answer to the fourth cause of action it is averred that the defendant knows nothing about the removal or destruction of the stairway and denies all liability. A cross-petition was filed and in it is alleged that the sum of \$1,450 was expended in alterations, and \$1,075 for picture show equipment, and by reason of the persistent occupancy of said living rooms by Nolan, defendant was compelled to close its picture show and in consequence suffered damage in the sum of \$5,000 for which it asks judgment.

To this answer and cross-petition a reply was filed, denying the essential averments of the answer and the allegations of the cross-petition and the issues being joined, trial was had and judgment rendered, from which error is prosecuted here.

The issues here are therefore practically as follows:

First. Is Nolan entitled to recover from the Amusement Company for the rentals accruing between the date of abandonment of the premises and the expiration of the year?

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Second. Is he entitled to recover the amount that would be required to place the building in the same condition as store rooms that it was in at the beginning of the term?

Third. Is Nolan entitled to recover for the rentals paid by him during his temporary absence from the living rooms; and

Fourth. Is the Amusement Company liable for the removal or destruction of the stairway?

However, there are possibly two principal issues which it is most important to determine here. First, it is assigned for error that the court erred in its charge as to the term of said lease and the amount of rentals that might be recovered thereunder.

It is conceded that the lease was for a term of five years; and that it was not acknowledged or recorded, and was therefore void. *Richardson v. Bates*, 8 O. S., page 257.

However, it is urged that since the parties went into possession under it, that it became effective as a lease from year to year. In support of that view *B. & O. R. R. v. West*, 57 O. S., 161, is cited. The first paragraph of the syllabus reads as follows:

“An entry under a lease for a term of years at an annual rent, void for any cause, and payment of rent under it, creates a tenancy from year to year upon the terms of the lease, except as to its duration.”

As above stated it is urged that in the instant case there was a tenancy from year to year, and therefore Nolan is entitled to recover for the remainder of the year from the date of surrender or the date to which rentals were paid. It must be conceded that when the Amusement Company went into possession under this void lease that it became a tenant, but the issue is, as to the term of the tenancy.

The last word spoken by the court of last resort in this jurisdiction upon this subject is *Building Company v. Watt*, 96 O. S., 75, and which is decisive of the issue here. The 7th paragraph of the syllabus reads as follows:

“Possession taken and rents paid under a defectively executed lease creates a tenancy from year to year, or month to month, dependent upon the terms as to payment of rentals, and the lessor, by instituting an action for accrued rentals or for the purpose of ejecting the lessee for nonpayment of rentals, is not thereby estopped to question the validity of such lease.”

In the foregoing it is not held differently from, but the rule is amplified somewhat, as stated in *R. R. Company v. West*; holding in *Building Co. v. Watt* that the term or period of tenancy created by entering into possession under a void lease is to be determined by the periods fixed for the payment of rentals.

The foregoing therefore determines the issue in the instant case, because the lease provides that the amount of the rentals to be paid for the whole term shall be \$2,100, payable fifteen dollars per month on the first day of each and every month during the first year and forty dollars per month during the balance of said term, commencing on the first day of March, 1915. Therefore the rentals were clearly and unmistakably payable monthly on the first day of each month, and the lessee having gone into possession, it created a tenancy from month to month. It is urged that the court erred in its instruction to the jury upon this issue, as follows:

“While the lease is not valid for a term of five years, it is in law effective and binding for a period of one year, if the premises were occupied and used by the defendants.”

In view of the above case of *Building Company v. Watt*, the conclusion must be that it was a tenancy from month to month and the trial court therefore erred in this instruction.

The next issue to be determined is, whether or not Nolan is entitled to recover the cost and expense of restoring his building to the same condition as store rooms as it was in before the alterations were made.

In that regard the lease provides that the lessee shall have the right to alter the building and make it suitable for the purposes of a moving picture theater. It is also provided that “at the expiration of this lease said premises shall be surrendered in as good condition as they now are in.”

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Numerous cases were cited to the effect that where a lease provides that the premises shall be restored to the same condition as they were in at the beginning of the term, then the lessor is entitled to a restoration of the building as it was before any alterations were made. The cases, however, are not in full accord on that proposition. Some courts have gone far beyond and held that even though a lease provides that premises shall be restored to the same condition as before changes were made, the tenant is not obliged to restore them to the same condition but leave them in as *good* condition.

The case of *McGregor v. Board of Education*, 107 N. Y., 511, is somewhat helpful in determining this issue; the plaintiff leased to the board of education certain premises which had been occupied as a dwelling house and which were to be used for the purposes of a public school and the necessary alterations were made in the building, and by the agreement the lessee covenanted to make them and to surrender the premises at the expiration of the lease in the *same* condition as they were at the beginning of the term, reasonable use and wear thereof by the public school and damage by the elements only excepted. The lessee changed the dwelling into a school house by removing partitions, etc. It was, in fact, a dwelling house changed into a school house, and in the instant case a store room or rooms were changed into a moving picture theater. At the expiration of the lease it became a question as to whether or not the lessee should be required to restore the building to its former condition or as it was at the beginning of the term, and it is provided in the latter part of the syllabus as follows:

“*Held*, that defendant was not bound to restore the premises to their former condition as a dwelling house; but that the evidence showed other damages, and the question as to whether or not they resulted from a reasonable use of the premises for school purposes was one of fact, and a submission of the same to the jury was proper.”

The proposition of interest in the above case is that the court held that the lessee was not bound to restore the prem-

ises to the *same* condition, that is, of a dwelling house, but to place them in as *good* condition, though the lease provided that the premises be restored to the same condition.

Another case well in point is *In re Milling Company*, 175 Fed., 308, the syllabus of which provides as follows:

“Where, at the commencement of a lease for a term of years, the premises were changed from a loft and office building to a factory, the expense of alterations necessarily to place them in their original condition after surrender on the tenant’s bankruptcy was not ‘repairs’ for which the landlord was entitled to claim under the lease, providing that the tenant shall make all inside repairs and alterations at his own expense.”

In this case the lease provided that the tenant should take good care of the premises, make all inside repairs and alterations at his own expense and at the end of the term surrender said premises in good order or condition. The court refused to allow a claim based upon estimates for rebuilding that part of the premises which had been changed.

Well in point with the foregoing is the case of *Perty v. Mott Iron Works Company* by the Supreme Court of Mass., 93 N. E., 798. In this case the tenant was authorized under the provisions of the lease to make permanent alterations in the building to accommodate his business, to remove same at the end of term providing he left the premises in good repair; the tenant decided to surrender the building as it was, that is, with the alterations, and it is held in the first paragraph of the syllabus as follows:

“Where trade fixtures, so constructed as to constitute an addition to the premises, were built by the lessee with the consent of the lessor and added nothing to the value of the premises, and their removal was necessary to let the premises to another lessee, the lessor could not recover from the lessee the cost of removal to adapt the premises to other uses, and the rent for the time required in doing the work, unless the lease gave the right.”

The foregoing is supported in principle by *Pfister & Vogel Co. v. Fitzpatrick Shoe Company*, 83 N. E., 878, so that the

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strong weight of authority is, that where substantial alterations and changes which become part of a building are made in or upon the premises and which are of substantial or *permanent* character and are made in pursuance of the provisions of the lease or with the consent of the landlord, no recovery can be had for the cost of restoring such premises, and the reason is obvious, because alterations of a permanent character would reasonably be presumed to remain as made, unless otherwise provided.

What is the situation here? Nolan entered into a contract by which he consented to the conversion of the building into a picture show auditorium. He lived in the second story of this property; he was, no doubt, about there much of the time and observed the progress of the changes and alterations being made and knew just what was being done. He made no complaint because he had agreed to it, and therefore had no reason to complain; he sold one of the windows which was eliminated by the alterations and received in consideration therefor the sum of \$55; he stood by, at least consenting, during the progress of the work.

Now he seeks to recover for the restoration of this building to store rooms as it was before the changes were made, and in so doing asks to recover for the window which he sold. It is not disputed that the premises were left in as *good* condition, possibly better, than they were in at the beginning of the term, but the lease is peculiar in its wording, and had the landlord intended to require the tenant to restore the premises to their former condition as store rooms, how easy it would have been to have so provided in the lease, but in making the same, the lessor was content to provide that they be placed in as "good" condition as they were at the beginning of the term, and the premises, so far as the record discloses, were left in as good, possibly better condition. Nolan's conduct clearly indicates that he did not expect more, or that the premises were to be restored to their condition before the alterations were made.

It is urged that the court erred in its charge upon this proposition, as follows:

“Now, gentlemen, you will look to the evidence on this claim of the plaintiff and determine whether or not this property was in as good condition as it was at the time it was occupied by the defendants, and in considering this you should take into consideration all of the facts surrounding the parties at the time this lease was entered into; the purpose for which the building was to be used; the purpose for which it was used before this time, and the purposes for which it would be available after this time.

“Was it in as good condition when they left it as it was when they went into possession of it; if you find from a preponderance of the evidence that these store rooms were not in as good condition as they were when the defendants went into the occupation of them, then the plaintiff would be entitled to recover upon this second cause of action and the measure of his recovery would be the difference in the value of the property at the time he leased it to them, and the time at which they left it, or the amount of money that it would take to place it in the same condition.”

By the foregoing instruction the court practically left it to the jury, as a question of fact, to construe the above part of the contract or lease in question, whereas it was the duty of the court; therefore the instruction was erroneous; and as between landlord and tenant it is a well established principle of law that where a necessity for the construction of a lease arises that it must be construed most favorably to the lessee. 24th Cyc., 915 and note 70. 2 Kerr on Real Property, Secs. 1110, 1242; 1 McAdam on Landlord and Tenant, p. 735.

Therefore resting this case upon the provisions of the lease, it must be held: first, that it was a tenancy from month to month, not from year to year, and Nolan can not recover the rentals from the date of surrender to the expiration of the year, and the instruction upon that issue was erroneous; second, that it was the duty of the court to construe the terms of said lease, concerning which an issue was made; and third, that it was not the duty of the lessee to place the premises in the same condition as before the alterations were made, but in as good condition as at the beginning of said term. Nolan can not therefore recover for the restoration of the building to its original condition or as it was before the alterations were made,

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nor can there be a recovery for the removal of the stairway.

There are other assignments of error, which do not affect the substantial rights of plaintiff in error, and it is not therefore necessary to discuss them here. For errors in the charge and the reasons above given the judgment is reversed.

POLLOCK and METCALFE, JJ., concur.

**ORDINARY CARE UNDER THE WORKMEN'S
COMPENSATION LAW.**

Court of Appeals for Hamilton County.

THE AMERICAN CHEMICAL CO. v. SMITH.

Decided, February 5, 1917.

*Negligence—Test of Liability under the Workmen's Compensation Act
—Ordinary Care only Required of the Employer—Fellow Servant
Rule—Two Allegations of Negligence with Evidence as to One of
Them Only.*

1. While the workmen's compensation act (102 O. L., 524) takes away the defenses of the fellow-servant rule, contributory negligence and assumption of risk, it does not enlarge the basis for recovery on the grounds of negligence beyond what existed at common law, and the employer is only required to exercise ordinary care under all the circumstances of the case.
2. The only test of liability under such act is whether the employer exercised the degree of care that ordinary prudent persons are accustomed to exercise under the same or similar circumstances.
3. Where a petition contains two allegations of negligence but no evidence is offered supporting one of the allegations, it is error to permit both questions to be submitted to the jury.

Healy, Ferris & McAvoy, for plaintiff in error.

Littleford, James, Ballard & Frost, contra.

Error to Superior Court of Cincinnati.

JONES, E. H., P. J.

This action was brought in the superior court of Cincinnati by Robert H. Smith, as plaintiff, against The American Chemical Company, defendant, for damages on account of injuries sustained by the plaintiff while in the employ of the defendant.

The second amended petition, upon which the case was submitted to the jury, alleged that the defendant was a corporation, and that it "employs and did at the times hereinafter referred to employ more than five workmen as employees regularly in its said business and had not at the time of the injury complained of herein paid any premiums into the State Insurance Fund in accordance with the laws of the State of Ohio relating to the compensation of injured employees."

Said second amended petition further alleged in substance that on December 4, 1913, the defendant was engaged in the business of manufacturing a chemical known as sal soda; that in the course of the manufacture of the said product it was necessary to carry it in iron pans of great weight, which had to be carried by two men from one portion of the cellar where it was stacked to another part of the cellar where it was dumped out; that by reason of the caustic properties of the sal soda the said pans had to be carried with hooks to protect the hands of the men; and that the floor of the cellar was very slippery with the liquid from the pans so that it was dangerous to stand upon it—particularly so as the floor was sloping. The amended petition then goes on to state that on the 4th day of December, 1913, the plaintiff was engaged with another man in carrying one of said pans, and that when they reached the point where the pan was to be dumped they undertook to fling the pan so that it would fall face downward upon the floor, as it was their duty to do; that defendant had negligently allowed the floor to become unsafe and slippery; that defendant had negligently allowed the handle of the pan into which plaintiff had caught his hook to become bent, and the rivets by which said handle was attached to the pan to become insecure, so that, when the men undertook to fling said pan, the end of the pan which plaintiff held came loose from the hook and fell upon plaintiff's

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left foot, bruising and crushing the foot and the toes thereof; and that on account of the slippery condition of the floor, caused by the liquor from the pans, plaintiff was unable to maintain his footing, or to get a firm footing, so that the above described fall of the pan was caused partly because the handle was bent and the rivets insecure, as aforesaid, and partly because he could not maintain a proper footing. The plaintiff in said second amended petition then sums up the negligence charged, thus:

“The said injury was directly and proximately caused by the negligence of the defendant in permitting the said handle of the pan to become bent and said rivets to become insecure as aforesaid and furthermore in permitting the floor to become slippery and in requiring plaintiff to work with a defective and unsafe contrivance and in an unsafe place, and said injury was caused without any fault or negligence whatever on the part of the plaintiff.”

The answer to this second amended petition admitted that the defendant was a corporation, and that it had not on said date, nor at any time prior thereto, paid any premium into the state insurance fund; and denied each and every other allegation contained in the petition.

The issues thus raised were tried to a jury, the trial resulting in a verdict and judgment in favor of the plaintiff for \$2,500, which judgment the plaintiff in error here seeks to reverse.

The effect of the so-called Workmen's Compensation Law upon the rights and duties of the parties to this action was a subject of controversy during the trial. The question was raised from time to time in various ways, but chiefly by requests for special instructions on the part of defendant, and objections thereto, and by exceptions on the part of the defendant to the general charge of the court.

It has been held in the case of *Gerthung v. The Stambaugh-Thompson Co.*, 1 Ohio App., 176, as follows:

“1. The workmen's compensation act, Section 1465-60, General Code (102 O. L., 529, Section 21-1), which provides that an employer of five or more workmen, who has not paid the

premiums prescribed by said act, shall be liable in damages to any employe for injury caused by 'the wrongful act, neglect or default' of such employer, his officers, agents or other employes, takes away the defenses of the fellow-servant rule, contributory negligence and assumption of risk, but does not enlarge the basis for recovery on the grounds of negligence beyond what existed at common law, and the employer is only required to exercise ordinary care under all the circumstances of the case.

"2. The only test of liability under such sections is whether the employer exercised the degree of care that ordinarily prudent persons are accustomed to exercise under the same or similar circumstances."

It seems to us that there can be no doubt but that the court in the above case correctly interpreted the language of the compensation law. It also appears that in the trial of this case the learned judge who presided recognized this as the law, and correctly charged the jury in clear and unequivocal terms, that the defendant by reason of its not having contributed to the state fund could not avail itself of the defenses of contributory negligence, fellow servant or assumed risk. This being the correct view of the law, the rulings of the court upon special instructions asked by the defendant were correct.

We have reached the conclusion, however, that the judgment in this case must be reversed for want of evidence in support of one of the charges of negligence made in the second amended petition. It will be noted that this petition contains two allegations of negligence on the part of the defendant. They are briefly stated: first, the defective handle of the pan; and, second, the slippery condition of the floor caused by the liquid from the pans. The trial court permitted both of these questions to be submitted to the jury, and charged it fully upon the law with respect to each. We fail to find any evidence of want of ordinary care on the part of the defendant with respect to the condition of the floor or with respect to the cellar being an unsafe place to work. The evidence shows that the escape of the liquid from these pans by overflow and splashing was unavoidable, and that the only thing defendant could have

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done when the floor became wet was to have ceased the operation of the plant, or at least to have removed the workmen from the cellar until the floor became dry. In view of the lack of any real, apparent danger from the wet and slippery condition of the floor, it seems to us such action would be requiring the defendant to exercise more than ordinary care; in fact it would be exacting a very extraordinary degree of care on his part.

A motion was made by defendant, at the close of plaintiff's evidence, and also at the close of all the evidence, for an instructed verdict.

Evidence in support of the other allegation of negligence, viz., the defective condition of the handle, was properly submitted to the jury.

In our view of the case the motion that counsel for defendant should have made was one to withdraw from the consideration of the jury the question as to the unsafe and slippery condition of the floor. However, an exception was taken by the defendant to the general charge, in which, as said before, the court dwelt at length upon and submitted to the jury this issue with respect to which we find there was no evidence of actionable negligence.

In the view that the case was submitted to the jury we think the court below erred in refusing to give special instruction No. 9, requested by the defendant, as follows:

"I charge you as a matter of law that before the plaintiff can recover in this case he must show by a preponderance of the evidence either, first, that the handle of the pan in question was defective and that such defective condition was the proximate cause of the injuries sustained by plaintiff, or, second, that the floor of the cellar at the point where the plaintiff was walking when he claims to have received the injuries in question was in an unsafe condition and that said unsafe condition was the proximate cause of said injuries so sustained."

Also that the court erred in refusing to propound to the jury special interrogatory No. 3, submitted by counsel for defendant, as follows:

"Did the defendant exercise ordinary care as to the condition of his cellar on the afternoon of December 4th, 1913, in

view of the nature of the sal soda business which was being conducted therein?"

But as both the special charge and the interrogatory relate in whole or in part to the condition of the floor, these errors become immaterial, and have no bearing upon the action of this court in reversing the case.

Interrogatory No. 1, submitted to the jury at the request of the defendant, and the answer thereto, were as follows:

"Was that part of the defendant's cellar where the plaintiff claims the pan fell on his foot a reasonably safe place to work on the afternoon of December 4th, 1913?"

Answer: "No."

It follows, from what has already been said, that this answer is not supported by the evidence.

For the reason that the trial court erred in submitting to the jury the question as to negligence with respect to the cellar and the floor thereof, and for the further reason that substantial justice was not done, the judgment will be reversed, and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

JONES, OLIVER B., and GORMAN, JJ., concur.

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LIABILITY OF SURETY COMPANY TO MATERIALMAN.

Court of Appeals for Stark County.

**AMERICAN FIDELITY COMPANY V. METROPOLITAN PAVING BRICK
COMPANY ET AL.**

Decided, February Term, 1919.

*Sureties—Rule that Liability of shall be Fixed by the Most Strict Law—
Not Applicable to Paid Sureties—Construction of Provision for
Immediate Notice of Default—Where the Bond Runs for Benefit
of Materialmen as well as Principal—Execution of Notes not Pay-
ment of Claim, When—Extension of Time of Payment not a Re-
lease of Surety.*

1. A provision in the bond of a surety company, covering a contract entered into by county commissioners for road work, that immediate written notice shall be given to the surety company of any known default on the part of the principal in said bond, does not contemplate that materialmen and laborers must give such notice as a prerequisite to the bringing of suit on their claims.
2. The mere execution and delivery of promissory notes, in the absence of an agreement that the said notes are in settlement of the indebtedness which they represent, does not operate as payment or settlement of the claim or release the surety, nor does a reasonable extension of time for payment operate as a release of the surety.

Lynch, Day, Fimple & Lynch, W. S. Ruff and C. B. McClintock, for plaintiff in error.

J. W. Craine, contra.

SHIELDS, J.

This was an action on a certain bond executed by the plaintiff in error as surety and others named therein as principals to the board of commissioners of Stark county, Ohio, to secure the faithful performance of a certain written contract entered into between said board of commissioners and said parties named

therein as principals, for the improvement of what is known as the Canton-Cairo road by grading and paving said road and otherwise improving the same.

Said bond contained the following provision :

“Now, if the said party of the second part in the said foregoing agreement, shall well and truly execute all and singular the stipulations in said agreement by him to be executed, and shall pay all just and legal claims for labor performed upon and material furnished for the work specified in said agreement, then this obligation is to be void, otherwise to remain in full force and virtue in law, we agreeing and hereby consenting that this undertaking shall be for the use of any laborer or any person furnishing material, for a just claim, as aforesaid, as well as for the said county.”

That for the purpose of carrying out said contract said named principals in said bond purchased from the Metropolitan Paving Brick Company certain brick, used in making said improvement, amounting to the sum of \$10,798.55, for which said sum with interest from February 1, 1916, judgment was prayed for.

After certain preliminary questions raised by motions and demurrer to said petition by the several defendants were disposed of, the American Fidelity Company filed its separate answer setting up two principal defenses:

First, that said surety company signed said bond as surety only; that long before the completion of said improvement, the purchase price of the brick furnished by said brick company became due and payable, and that if any default by said contractors in the payment of said brick existed, such default existed long prior to the payment by said board of commissioners of the several amounts thereafter accruing under the several estimates made to said contractors, and that said amounts were largely in excess of said brick company's claim, all of which was known to said board of commissioners and its engineer, but unknown to the said surety company, and that notwithstanding the provisions of said contract and bond, neither said board of commissioners,

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nor its engineer, nor said brick company gave any notice to the said surety company of any default of the principals in said bond in the payment of said brick company's said claim, but wholly failed to do so, and that by reason thereof said American Fidelity Company is and was thereby released and discharged as surety from any and all liability to the said brick company.

Secondly, that after the purchase price of said brick became due, without the knowledge or consent of the said surety company, said brick company agreed with the principals in said bond to extend the time of payment for the purchase price of said brick, and that on February 1, 1916, in consideration of the execution and delivery to said brick company of certain notes by the said J. B. Smith and J. C. Krabill did so extend the time for the payment of said brick for a definite time, which said notes were accepted by said brick company in full settlement of its said claim; that said Smith and Krabill afterward executed a chattel mortgage on certain property to secure the payment of said notes, and that suit was afterward instituted thereon. Further, that at the time the payment of said brick company's said claim was so extended, said principals in said bond were each financially responsible and then had property available on execution sufficient to satisfy said brick company's said claim, but that since said time their financial condition has materially changed and their property has become so encumbered as to render the same less available to execution, and that by reason of said wrongful extension of time the rights of said surety company have thereby been prejudiced and that said surety company became and was thereby discharged from all liability to said brick company under the conditions of said bond.

In an amendment to its said answer, said surety company set up that said brick company did not bring its action within one year from the time of furnishing said brick pursuant to the provisions of Section 6974, General Code, which became effective September, 1915.

Separate answers were filed by the defendants, Wise and Garaux, and a joint answer by the defendants Smith and Krabill, in each of which the execution of notes of said Smith and Krabill to said brick company in settlement of said brick company's said claim was averred, and the subsequent execution of a chattel mortgage by them to secure the payment of said notes.

A separate reply was filed to each of said answers by said brick company, denying in substance the allegations therein, inconsistent with the allegations of the petition, and in reply to the second defense of said surety company, said brick company admitted that at the time of the filing of said answer an action was pending in said Stark county common pleas court on the part of said brick company to recover upon said promissory notes in cause known as No. 28264 therein, but that since the filing of said answer said cause has been dismissed.

With the issues thus made, a jury was waived and said cause was submitted to the court below, resulting in a judgment in favor of the brick company. By a petition in error filed in this court a reversal of said judgment is sought, principally upon the specifications of error in grounds designated as Nos. 6 and 7, and which in substance are as follows:

"No. 6. Because said court erred in failing to find that the provision contained in said bond requiring immediate written notice of any known default on the part of the principals in said bond was applicable to said brick company, and was a condition precedent to the right of said brick company to recover against the said surety company as surety on said bond; and that said court failed to find that the failure of said brick company to give such notice and to perform such precedent condition operated to release said surety company from all liability to said brick company, and was and is a bar to the right of said brick company to recover on said bond.

"No. 7. Because said court erred in failing to find that under the terms and conditions of said bond rendering the same available to material men, the duty devolved on said brick company to notify said surety company of any default known to it on the part of the principals in said bond within a reasonable time; and also erred in failing to find that said surety company was re-

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leased from any and all liability to said brick company on account of the latter named company's failure to give such notice."

It is fundamental that a surety ordinarily is held liable to the strict letter of his contract and that such contracts receive a strict construction by courts. While this is true of individual sureties, courts of equity recognize a distinction between a surety signing for another gratuitously as a mere accommodation and a surety company engaged in the business of furnishing bonds for profit, the latter not being accorded the same degree of protection as the former. This distinction is recognized by both the United States and state courts generally and, among others, the case of *City of Topeka v. Federal Union Surety Company et al*, 213 Federal Reporter, 958, may be cited where it was held:

"The general rule that a surety should be held only where his liability is fixed by the most strict law does not apply to a corporate surety, which is engaged in the business of becoming surety for premiums supposed to be based on the amount of the risk, but on the contrary, such contracts are construed most strongly against the surety."

And the court in its opinion on page 962 in said case says:

"Generally the surety is a favorite of the law, and should be held only where his liability is fixed by the most strict law. That is to say, what is known as the rule of *strictissimi juris* applies. These rules have no application to a corporate surety which is engaged in the business of becoming surety for premiums which are supposed to be based upon the amount of such risks. It is not in the position of a voluntary surety who signs his principal's obligation. Upon the contrary, surety bonds are usually on forms prepared by the company, and in place of a strict construction in favor of such surety the instrument is construed most strongly against the surety. Contracts of such companies bear a distinct analogy to insurance, and are largely governed by the same rules in construction."

Numerous cases are cited in the foregoing case both in the federal and state courts sustaining the same doctrine announced

in said case. But while it is held that bonds so executed are not to be construed as an individual gratuitous surety, still the law clothes a surety company with certain legal rights which if ignored by those for whose benefit its bond is given, it may be relieved from its obligation of suretyship. We are not prepared to say and do not say, that *any* violation of the provisions of such bond would relieve such surety company, but interpreting the contract embraced in the bond in the light of the ordinary rules of law, reference is had to a violation of its terms in some material matter affecting the substantial rights of the surety company. Here it is claimed on behalf of the plaintiff in error that the Metropolitan Paving Brick Company had knowledge of the provisions of the bond given for the protection of those furnishing material for said road improvement, and having such knowledge it was chargeable with notice of the stipulations it contained. Among other things, said bond contained the following:

“Provided, that said surety shall be notified in writing of any act on the part of the said principal, which shall involve a loss for which the said surety is liable hereunder, immediately after the occurrence of such act shall have come to the knowledge of the board of engineers of the obligee herein, and a registered letter mailed to the surety, at its local office at Canton, Ohio, shall be deemed sufficient notice within the meaning of this bond.

Provided further, that if the said principal shall fail to comply with the conditions of said contract to such an extent that the same shall be forfeited, then said surety shall have the right and privilege to assume said contract, and to either complete the same, or, by and with the previous consent of said board, sublet the same, whichever surety may elect to do, provided it is done in accordance with said contract.”

It was argued on behalf of the plaintiff in error that by the terms of the bond already referred to herein providing that *immediate* notice in writing should be given to said surety company of any default upon the part of the principals named therein is a condition precedent, and this condition not having been complied with, the surety company was thereby relieved of liability on said bond. As was held in the case of *Traveler's In-*

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urance Company v. Myers & Company, 62 O. S., 529, "immediate written notice in said stipulation (referring to an insurance contract) means written notice within a reasonable time under the circumstances of the case, and where the facts are not disputed what is a reasonable time is a question of law." Here it is conceded that the first notice of any default under the bond given by the brick company was more than a year after the completion and acceptance of the improvement by the said board of commissioners, and if the duty of giving such notice devolved upon the creditors of said contractors, it could scarcely be contended that notice given by the brick company was in contemplation of law given within a reasonable time. That the provision requiring such notice to be given is a material provision admits of no discussion, for it is not difficult to understand that a surety company's liability may be lessened by prompt notification of a default on its indemnity bond. Counsel for plaintiff in error cite many adjudicated cases showing the materiality and necessity of notice when inserted in an indemnity bond, and when so inserted that the giving of such notice is a condition precedent to a recovery on such bond, while it is urged on behalf of said brick company that said cases do not meet the conditions of the case at bar and are therefore inapplicable. In short, it is insisted by said brick company that the bond here given was given to the said board of commissioners for and on behalf of Stark county, and not to the said brick company, and therefore if any notice was to be given the surety company of any default under said bond it was to be given by said board of commissioners or its engineer, and not by said brick company, which was not a party to said bond for said improvement. That said bond was given for the benefit of said Stark county and for laborers and materialmen is apparent, and the mere fact that there was no statute then in existence expressly authorizing provision to be made for their special benefit is of no moment. As was held in the case of *American Surety Company v. Raeder, Assignee*, 15 C. C., 47, 49, "the subject-matter of a contract was clearly within the jurisdiction of the board, and the contract one that the board had ample authority to make, independent of any

express provisions of the statute." Such jurisdiction and authority were exercised here and we know of no instance where such provision has not been enforced for the protection of those for whom made, when not burdened with other conditions. As stated, it is urged here that by every rule of construction the obligation to give notice to the surety company of any default under said bond is extended to the materialmen, who it is claimed acted through and adopted the county as their agent, thereby assuming the same relation and obligation to the bond as the county. As we read the evidence in the case, while it was provided by the side-agreement between said brick company and said contractors that a copy of such agreement should be filed with said board of commissioners, it appears not to have been so filed, nor does it appear that any transaction was had at any time during the construction of said improvement, or afterward, between said board of commissioners and said brick company whereby the claim of the latter was brought to the knowledge or attention of said board of commissioners. So far as the record shows, said board of commissioners had no knowledge whatever of the existence of such claim. It was argued that it was the duty of said brick company to have looked after its interests by presenting to and filing its said claim with said board of commissioners before payment of the contract price for said improvement was made to said contractors, independent of any bond, on the ground that the policy of the law is to reward the vigilant creditor, but the rejoinder is made that the bond of the surety company was the continuing protection of said brick company until its said claim was barred by the statute of limitations, and moreover, that the surety company having given its bond for the faithful performance of the conditions thereof, it could not close its eyes and remain indifferent to its liability, relying on notice to be given by materialmen whom they couldn't and didn't know when the bond was signed. No express provision is contained in said bond that notice shall be given by laborers or materialmen. If it was so intended, the inquiry is naturally suggested. Why was it not so designated in the bond? if deemed necessary for its protection, the company had the un-

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doubted right to insert such provision in the bond. Quoting from the brief of counsel for plaintiff in error—

“The surety company was under no obligation to enter into this bond for the protection of the county and the materialmen, and if it saw fit to do so it had a legal right to carry into the bond such conditions as it thought advisable for its protection.”

The provision mentioned expressly says “said surety shall be notified * * * immediately after the occurrence of such act shall have come to the knowledge of the board or engineer of the obligee herein.” We do not feel at liberty, aided by any rule of construction, to go outside of and read into this bond contract an interpretation which will restrict or extend the meaning of its provisions which appear clearly expressed therein. As applied to said contract, we are disposed to adopt the reasoning and apply the rule laid down by the Supreme Court in the case of *Slingluff et al v. Weaver et al*, 66 O. S., 621. Without further extending the discussion on this branch of the case, we are of the opinion that said bond does not contemplate that laborers or materialmen shall give the notice mentioned in said bond as a prerequisite to the bringing of suit on their claims.

Another ground of error alleged is that said brick company agreed to extend and did extend the time of payment of the purchase price of said brick for a definite time and for a consideration, without the knowledge and consent of the plaintiff in error, and to its prejudice. This allegation of error relates to the notes and chattel mortgage given by Smith and Krabill, two of the contractors, to the brick company, which it was claimed were accepted in settlement and payment of said brick company's account. The record shows a marked conflict in the testimony given by these parties and that of A. P. Maurer, the sales-manager of the brick company, as to the circumstances under which said notes were given and why they were given. The former testified that they were given in settlement and payment of said brick company's account, which was denied by Maurer, who further testified that they were given February 1, 1916, when

the books of said company were balanced, and when the amount here sued on was found to be due said company from said contractors who executed said notes which were taken by said brick company not as payment of said account, but as security therefor, and that no credit was ever given them or entered on the books of said company for said notes. The trial court was clothed with the prerogative of a jury to determine the credibility of witnesses and the weight to be given to their testimony, and the judgment below would seem to indicate how said court viewed the testimony of these witnesses. However this may be, the suit brought on said notes was dismissed without prejudice before this suit was instituted. We might here add that the mere giving of these notes, in the absence of an agreement that the same should be and were in settlement of said brick company's account, would not operate as payment or satisfaction of said claim, nor would a reasonable extension of time, if given, necessarily operate to release a paid surety company. *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416; *Standard Salt & Cement Co. v. National Surety Co.*, 134 Minn., 121, and numerous cases cited therein.

It was also argued that under the amended answer of the plaintiff in error in respect to the necessity of suit being brought within one year from the date of the delivery or furnishing of material, the provisions of the act referred to apply in this case to the material furnished by said brick company after September, 1915, when the provisions of said act became effective. It will be sufficient to say that the contract for the brick furnished by said brick company for this improvement appears to have been entered into a year or more before the passage of said act and therefore its provisions cannot be held to apply to this case.

As to the error assigned that "the findings and judgment of the court in said cause are not sustained by evidence and are clearly and manifestly against the weight of the evidence," we need only say that the bill of exceptions together with the briefs of counsel have been read, examined and considered by us

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with no little care with reference to the issues herein, and while in some aspects of the case our first impressions have yielded to the result of subsequent investigation, we have reached the conclusion that under the evidence and the law, the judgment of the court of common pleas was right and should be affirmed. It is so ordered. Exceptions.

HOUCK and PATTERSON, JJ., concur.

EMPLOYEE INJURED IN THE FALL OF AN ELEVATOR.

Court of Appeals for Hamilton County.

JONES V. THE FERGER GRAIN CO.*

Decided, March 26, 1917.

Negligence—Elevator Falls—Employee Injured—Application of the Res Ipsa Loquitur Doctrine—Effect of Enactment of Workmen's Compensation Law.

1. Prior to the enactment of the Workmen's Compensation Law the *res ipsa loquitur* doctrine as a rule did not apply as between master and servant, but with the common-law defenses denied an employer and employe are placed in the position of strangers to each other, in so far as that rule is concerned.
2. The breaking of an elevator rope when bearing a load, which, when in proper condition, it would have borne without breaking, is some evidence that the rope had become defective and is sufficient to require the submission of the case to the jury.
3. Attempted explanations by the defendant of the breaking of the rope may be found by the jury to be unsatisfactory, and the jury may find for the plaintiff by applying the doctrine of *res ipsa loquitur*.

B. F. Graziani and Thos. L. Michie, for plaintiff in error.

John C. Hermann and Sherman T. McPherson, contra.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, July 3, 1917.

HAMILTON, J.

Error to the Court of Appeals for Hamilton county.

This cause comes into this court on a petition in error to the Superior Court of Cincinnati.

The plaintiff below in his amended petition alleges that the defendant is a corporation organized under the laws of Ohio, engaged in operating a grain elevator and storage room for grain, feed and other material of like character; that in March, 1912, he was employed by defendant company as a common laborer to work in and about defendant's place of business, and was so engaged until about October, 1913, when the defendant ordered and directed the plaintiff to run and operate an elevator or lift, from the first floor to the third floor in said elevator and storage building; and that pursuant to said orders and directions plaintiff ordered and ran said elevator or lift, and on the 26th day of December, 1913, while plaintiff was operating said elevator or lift, the rope operating the elevator or lift broke without notice or warning, causing the elevator to fall, carrying plaintiff with it, from the third floor to the first floor of the building, some eighty feet descent, causing serious and permanent injuries. The amended petition further states that said defendant corporation at and before the time of said injury employed five workmen regularly in the same business and had not paid into the state insurance fund the premium provided by the law known as the Workmen's Compensation Law. The petition further alleges negligence on the part of defendant in not furnishing a safe place for plaintiff to work, with proper safeguards, and in furnishing unsafe appliances and attachments; that the rope was unfit for the purpose, and defective in certain respects. Other acts of negligence are alleged, but they are not necessary to the consideration of the question of error involved.

The defendant's answer admits that it is a corporation engaged in the business of operating a grain elevator, etc., as stated in the amended petition. It further admits that the plaintiff was employed by it upon the 26th of December, 1913; admits the operation of the man-lift by the plaintiff, and the

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breaking of the rope, thereby causing said lift to fall as alleged in the petition. The answer also admits that at the time of the injury to plaintiff it employed more than five men regularly in the same business and in and about the same establishment, and that it had not paid into the state insurance fund any premium provided by the act of the general assembly of Ohio known as "The Workmen's Compensation Law," which act was in full force and effect at said time. The answer then denies the allegations of permanent injury to the extent of the injuries complained of; avers that the lift and all its appliances were in first-class condition and proper working order; and denies any negligence on the part of defendant, but alleges that the breaking of the rope was due to the carelessness of the plaintiff.

Plaintiff in his reply denies that said lift and all its appliances were in first-class condition; denies that the breaking of the rope which permitted the elevator to fall was caused by the carelessness and negligence of the plaintiff; and denies any act of negligence on the part of the plaintiff.

At the close of all the evidence the defendant moved to arrest the case from the jury, which motion the court granted, and the jury was instructed to return a verdict for the defendant, which was done; to which the plaintiff duly excepted. A motion for new trial was overruled, and judgment was entered accordingly.

Several grounds of error are stated in the petition in error, the first three of which relate wholly to the question of the instructed verdict, which is the ground chiefly urged for reversal of the judgment.

It is admitted by the pleadings that the Workmen's Compensation Law was in force at the time of the happening of the injury; that the defendant company employed more than five men regularly in the same business and had not paid into the state insurance fund the premium provided for in that law. It therefore follows that defendant can not avail itself of the defense of the "fellow servant" rule, the defense of "assumption of risk," or the defense of "contributory negligence," and the consideration of the questions involved must be had under this law.

The lift, or man-lift, was used in the defendant's place of business for the purpose of carrying only one man, the employe of the defendant company, from the lower to the upper floors of the warehouse. The lift was operated by a hand rope, with the help of the weight attached to the rope which ran over a pulley at the top of the elevator shaft.

Prior to the enactment of the Workmen's Compensation Law it must be conceded that the *res ipsa loquitur* doctrine as a rule did not apply as between master and servant, but, with the common-law defenses denied defendant, the employer and employe are placed in the position of strangers to each other, in so far as that rule is concerned. The question then is: In the light of the Workmen's Compensation Law does the *res ipsa loquitur* doctrine apply to the instant case?

The defendant relies mainly on the case of *The Julian & Kokenge Co. v. Wm. Panter*, decided by the Hamilton County Court of Appeals, reported in the Cincinnati *Court Index* under date of January 14, 1914. In that case the question of error upon which reversal was had was the overruling by the lower court of a motion to make the petition more definite and certain by stating in what respect said staple which pulled out was insecurely and defectively fastened and in what respect the manner in which plaintiff was required to do said work was dangerous and unsafe. In determining that question the court followed the case of *Egan v. N. Y. C. & St. L. Ry.*, 5 C. C., N. S., 482, which decision was rendered long prior to the passage of the Workmen's Compensation Law and would not be controlling in a case where this law is applicable; and while the reason in that case might well apply to the motion to make the petition more definite and certain, it would not obtain in applying the *scintilla* rule, applied with reference to Section 6243, General Code, and the Workmen's Compensation Law.

An examination of the authorities leads us to the conclusion that the doctrine of *res ipsa loquitur* may well be applied to the case at bar.

In the case of *Dahlen v. N. Y. Life Ins. Co.*, 109 Minn., 337, where the plaintiff was injured in defendant's elevator, of which defendant had control, the court say, at page 340:

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“It follows that, if the accident did occur by reason of the elevator not working properly while the plaintiff was operating it, without any fault on his part, proof of such fact would be sufficient *prima facie* to establish the negligence of the defendant.”

In *Green v. Banta*, 48 N. Y. Super. Ct., 156, affirmed 97 N. Y., 627, it was held that the fact that the scaffold gave way was *prima facie* evidence of negligence.

In *Solarz v. Manhattan Ry. Co.*, 8 Misc. N. Y., 656, it was held that the unexplained breaking down of the scaffold made out a case sufficiently strong to go to the jury on the subject of negligence.

In the case of *Golden v. Mannex*, 214 Mass., 502, the second and third paragraphs of the syllabus are as follows:

“In an action for personal injuries caused by the breaking of a cable when it was bearing a load which, if it had been in proper condition, it would have borne under the circumstances without breaking, the mere fact that the cable broke is some evidence that it had become unsound.

“If, under the circumstances in evidence at the trial of an action for personal injuries caused by the breaking of a cable, the mere breaking of the cable is evidence that it had become unsound, the jury, although the plaintiff attempts to explain the cause of the breaking, may find such explanation to be unsatisfactory and still may find for the plaintiff by applying the doctrine of *res ipsa loquitur*.”

It is claimed by counsel for defendant in error that this last case cited should not apply, as it does not show that the hoist was operated by the plaintiff who was injured. This position is not tenable, as the defenses of assumed risk and contributory negligence are eliminated from the case at bar.

The evidence in this case discloses that the plaintiff in the discharge of his duty as an employe of the defendant was going up in the man-lift, when, about at the third floor, on account of some unexplained cause, the lift rope broke, causing the lift to fall with plaintiff, resulting in the injuries complained of. Under the authorities above cited we are of the opinion that the

very fact that the rope broke as it did was some evidence that it had become unsound, and was sufficient to go to the jury. It follows that the trial court erred in arresting the evidence from the jury and instructing a verdict for the defendant.

We do not think the witness W. R. Todd qualified as an expert on elevators or man-lifts of the kind in question, as he testified he had never seen but one of this character. No doubt he was an expert on passenger elevators and electric elevators, but we do not think that he was sufficiently familiar with the kind in question to properly qualify as an expert, and the objection to his testimony was properly sustained.

Judgment reversed, and cause remanded.

JONES, P. J., and GORMAN, J., concur.

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**CARE REQUIRED BY OWNER OF PREMISES FOR SAFETY OF
EMPLOYEE OF AN INDEPENDENT
CONTRACTOR.**

Court of Appeals for Lucas County.

(Shohl, P. J., and Hamilton and Cushing, JJ. of the First District,
Sitting by Designation in Place of Kinkade, P. J., and Richards
and Chittenden, JJ., of the Sixth District.)

THE NATIONAL MACHINERY COMPANY V. CHARLES D. TOWNE.

Decided, June, 1919.

*Negligence and Assumed Risk—Employee Sent to Repair Windows of
a Factory—Injured by a Traveling Crane—Degree of Care Re-
quired of Proprietor for the Safety of a Contractor's Employee—
Charge of Court—Proximate Cause.*

1. A landowner owes to an employee of an independent contractor, who is rightfully on his premises, the duty to use ordinary care not to injure him.
 2. Where plaintiff, an employee of an independent contractor, with defendant's knowledge used the track of a traveling crane in making repairs on defendant's factory building, plaintiff did not assume the risk of defendant's negligence in operating the crane on such portion of the track where plaintiff was standing, without notice to him.
 3. The promise of the operator of the traveling crane to plaintiff, while it created no new obligation on the part of defendant, was a proper element to be considered in determining whether the conduct of plaintiff was that of a reasonable man.
 4. The negligence of plaintiff, to bar relief, must proximately cause the injury.
 5. The word accident, as used in actions for damages for personal injuries, sometimes means an occurrence to which human fault does not contribute; and the court did not err in refusing to give a special charge so characterizing the occurrence.
 6. Where instructions are requested by a party after argument, the court is not required to use the precise terms or language submitted; it is sufficient if the substance thereof be given in other instructions or in the general charge.
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Roger & Spittler, McCauley & Weller, Marshall & Fraser, for plaintiff in error.

Kohn, Northup & McMahon, contra.

SHOHL, P. J.

Defendant in error, Charles D. Towne, was employed by one Arthur C. Souders, who was an independent contractor making some repairs on the factory building of The National Machinery Company of Tiffin, plaintiff in error. He was putting flashing in some windows and was standing inside the building on the track of a traveling crane, when he was struck by the moving crane and injured.

The petition alleged that the traveling crane was 30 to 35 feet above the ground, tracks being approximately 35 feet apart and constructed about the room near certain ventilating windows; that the crane could be easily moved or stopped by the defendant; that the plaintiff was employed by a third person as roofer and roof repairer; that it was necessary for him to stand upon the track and make repairs on all the windows; that immediately before he took his position on the track, he was informed by the defendant that defendant would keep a lookout for him, if the crane was to be moved, and would give him ample signal by bell so that he could remove himself to a place of safety. At the time he was injured he was standing with his back to the crane, as it was necessary for him to do to make the said repairs; that the operator of the crane, without any warning or signal to him, negligently started and propelled the crane and ran it upon and against the plaintiff. After reciting the injuries received, it avers:

“Plaintiff says that the defendant negligently caused said crane to strike and crush plaintiff’s legs as aforesaid, in that it propelled said crane upon him without giving any warning or signal whatever of its intention so to do, and plaintiff did not see and did not hear said crane as it was propelled upon him, and had no opportunity whatever to remove himself to a place of safety. That said defendant in the exercise of ordinary care would have seen plaintiff and would have given him timely warning before injuring him as aforesaid.”

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The defendant filed an answer denying the substantial averments of negligence, and, by way of second defense, alleged that if the plaintiff was injured at the time and place alleged in the petition, such injuries were caused solely and proximately by his own carelessness in that he voluntarily and needlessly, without the advice, direction or knowledge of the defendant, suddenly placed himself in front of the crane, which, as the plaintiff well knew, was a place of great danger, which he also knew was constantly moving from one end of the building to the other along a rail; that the operator of the crane would not know and did not know that the plaintiff was at that time near or in front of the crane in a place of danger; notwithstanding the said knowledge, plaintiff placed himself immediately in front of said crane and carelessly turned his back on it and exercised no care to learn its movements, and in placing himself in this danger, he, without any warning to defendant, climbed into one of the ventilating windows in the roof of the building so that the operator of the crane, in the exercise of ordinary care and in the exercise of his duties, would not, could not and did not know of his presence there.

The reply denied the allegations of new matter contained in the answer.

The case was tried twice. At the first hearing a verdict was rendered for the plaintiff for eight thousand dollars, and that was set aside by the trial court for misconduct of a juror. The second trial took place in January, 1919. There was a conflict in the evidence, which it will not be profitable to set out at length. The jury rendered a verdict for plaintiff for fifteen thousand dollars.

Plaintiff in error contends that defendant in error was guilty of contributory negligence, or assumed the risk of injury by exposing himself to an obvious and appreciated danger. It is not vital to determine whether the doctrine of assumed risk, as distinguished from contributory negligence obtains in Ohio in cases that do not arise out of the relation of master and servant. See 5 Corpus Juris, 1413 and 14. The risk which Towne would have assumed, if the doctrine of assumption of risk was appli-

cable, is the risk of working in a dangerous place. He did not assume the risk of defendant's negligence in operating the crane, on the part of the track where he was standing, without notice to him. *Standard Steel Car Co. v. McGuire*, 161 Fed., 527. But whether the defense be regarded as assumed risk or contributory negligence, the situation must be considered in connection with the alleged conversation between the plaintiff and Negele, the operator of the crane. Plaintiff testified to the allegations of the petition in respect to the promise by Negele to warn him, that Negele said he would give him warning and lookout for him.

Negele was without authority to extend an invitation to an outsider who would otherwise be a trespasser or licensee on the premises. *Curtis v. Stone Quarries*, 37 Wash., 355, 362; *Macartney v. Coldwell*, 29 R. I., 21; *Formall v. Standard Oil Co.*, 127 Mich., 496. See 6 Labatt on Master and Servant, Sec. 2500.

It must be borne in mind, however, that Towne was not a trespasser and was rightfully on the premises, independent of any invitation from Negele. 1 *Thompson on Negligence*, 2nd Ed., Secs. 680, 979; *Penn Co. v. Gallagher*, 40 O. S. 637, 644.

If Negele did in fact tell plaintiff that he would lookout for him and would warn him before moving the crane, even though that created no duty on the part of the company, it would have bearing and would be entitled to weight in the determination of whether Towne's conduct under all the circumstances was that of a reasonable man. If the jury believed and found that Negele had spoken as Towne testified, the conduct of Towne in working with his back to the crane and without looking around at frequent intervals, did not constitute negligence as a matter of law. It presented a question for the jury. We cannot say therefore that the judgment is contrary to law, nor in view of the entire record is it so manifestly against the weight of the evidence as to warrant a reversal on that ground.

Complaint is made because the court gave certain special charges before argument among which are the following:

No. 7. "The fact, if you should so find it to be, that the work Towne was doing could be done as well from the outside

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of the window as from the inside is entirely immaterial if his presence was known to Negele at the time of starting the crane just prior to the time that Towne was injured, or if Negele in the exercise of ordinary care would have known of Towne's presence on the track."

No. 14. "If you find from a preponderance of the evidence that the cranesman, Negele, knew that said plaintiff and other persons were engaged the morning of the accident and prior thereto, in working upon said track, then I charge you that it was the duty of said cranesman to exercise ordinary care toward them and if you find from a preponderance of the evidence that he did not exercise ordinary care toward them, and thereby the plaintiff was injured, you will be warranted in finding that defendant was negligent."

No. 18. "The defendant owed the duty of using ordinary care towards Towne independently of promises on the part of Negele. So whether Negele promised Towne to watch out for him and give warning by gong, or did not so promise, nevertheless if he failed to use ordinary care towards Towne in the operation of the crane and thereby solely and directly caused the injury to Towne, Mr. Towne is entitled to a verdict at your hands."

No. 18. "The defendant owed a duty to Towne not to negligently bring force to bear upon him. It owed this duty independently of any promise on the part of Negele or any other person and if the defendant negligently brought force to bear upon the plaintiff, it is liable for whatever damages were directly and proximately caused thereby.

"In this connection I say to you that the negligence of Negele, if any there was, was the negligence of the defendant company."

Charge No. 7, fairly construed, does not assume the presence of plaintiff on the track to have been established as prohibited by the rule set forth in *Cline v. State*, 43 O. S., 332, and *Weybright v. Fleming*, 40 O. S., 52. It states the law applicable if the jury found that plaintiff was in fact on the track. Nor is it otherwise incorrect in the case at bar. The defendant had actual knowledge of Towne's presence on the premises. He was rightfully there. They owed to him as the employee of an independent contractor the duty to use ordinary care. 1 Thomp-

son on Negligence, 2nd Ed., and Supplement, Sec. 979; *Penn Co. v. Gallagher*, 40 O. S., 637; *Kelly v. Howell*, 41 O. S., 438; *Graham v. Brandt Shoe Co.*, 165 Mo. App., 361; *Winona Technical Inst. v. Stolte*, 173 Ind., 39, 48.

The case is distinguished from that of a trespasser or person who is wrongfully on the premises of another as in the case of *Erie R. R. v. McCormick*, 69 O. S., 45. See *Railroad Co. v. Harvey*, 77 O. S., 235, 240. Having knowledge of his presence, their duty to use ordinary care might be found by the jury to include an obligation to keep a lookout for him under the conditions shown in the case at bar. *Standard Steel Car Co. v. McGuire*, 161 Fed. 527.

Charge No. 14 is not seriously objectionable as tending to confuse the jury by reference to the duty of the cranesman to other persons. The jury could not have been misled. Nor was the court wrong in charging the jury on the law applicable if Negele knew beforehand that plaintiff was working on the track. Though it was not alleged in the petition, the court might properly charge respecting the situation developed by the evidence. *Rayland Coal Co. v. McFadden*, 90 O. S., 183.

Charges No. 18 and No. 19 were correct statements of law for the reasons already stated in the consideration of the evidence as to the promise of Negele in its bearing on the points hereinbefore discussed.

The court refused certain special charges requested by defendant before argument.

No. 8. "If the plaintiff in any degree directly contributed by any act of his to bring about this accident then your verdict must be for the defendant."

The negligence of plaintiff to bar relief must proximately cause the injury. *Schweinfurth v. Railway*, 60 O. S., 215. This was not made entirely clear by the charge in the form requested. Furthermore, the occurrence is characterized as an "accident." The word "accident," as used in actions for damages for personal injuries, sometimes means an occurrence to which human fault does not contribute, 1 Corpus Juris, 390-392, and the use of the word might tend to mislead the jury.

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Charge No. 9 as requested is:

No. 9. "If the work of nailing on the tin flashing could have been as conveniently and safely done from the outside of the building, then your verdict must be for the defendant."

If counsel were aiming to state the rule as laid down in *Schaeffler v. Sandusky*, 33 O. S., 246, to the effect that whoever voluntarily and unnecessarily encounters a known and easily avoidable peril, cannot be regarded as exercising ordinary prudence, then the foregoing charge is not within it. If the charge requested were correct, it follows, that if it were equally convenient and safe to do the work from the inside as from the outside, a plaintiff could never recover no matter where he worked if his choice of sides resulted in injury.

After argument the defendant requested the court to charge:

"You are instructed that if the plaintiff by a failure to exercise ordinary care for his own safety directly and proximately contributed to produce this injury, then your verdict must be for the defendant. You are further charged that if this accident was caused by the joint negligence of the defendant and plaintiff, that negligence of both parties combined to produce the result, then your verdict must be for the defendant."

Even if the instruction requested is proper, unless counsel comply with Section 11447 and present it in writing before argument, the court is not required to give it in the precise terms or language as submitted. It is sufficient if the substance thereof be given in other instructions or in the general charge. *Rheinheimer v. Aetna Life Ins. Co.*, 77 O. S., 360. The language of the instruction requested was not altogether fortunate. There was no "joint" negligence alleged or proved. If counsel had in mind concurrent negligence, the court charged properly upon that point.

Complaint is made that in explaining the law as to the negligence of both parties the court charged on the effect of the negligence by plaintiff using the phrase "the proximate cause." With reference to the negligence of plaintiff the phrase "a prox-

imate cause'' would probably have been clearer. The court stated that if the jury find from the evidence that the defendant was guilty of negligence, and, if they further find the plaintiff was guilty of negligence and that this latter negligence contributed to and was the proximate cause of the injuries, the verdict must be for the defendant. The court further charged that if the negligence of the plaintiff was the *sole* cause of his injuries, he could not recover. Taking the charge as a whole it is apparent that the phrase "*the proximate cause*" was not used to mean "the sole, proximate cause."

The court said in another part of the charge that the negligence of the plaintiff would bar recovery if it was the proximate and immediate cause of the injury. Plaintiff in error complains of the use of the word "immediate." The negligence that defendant charges against plaintiff consisted in suddenly placing himself in front of the approaching crane. The issue on that point was simple. Under all the circumstances, the use of the phrase "proximate and immediate cause" in its context meant no more than "proximate cause." See *Lonabaugh v. Ry. Co.*, 9 Nev., 271, 294, *Kline v. Ry. Co.*, 37 Cal., 400, 406; *Fitch v. Ry. Co.*, 45 Mo., 322, 327.

The verdict and judgment were for fifteen thousand dollars, which it is contended is excessive. We will not attempt to set out the evidence in respect to the extent of the injuries, the pain and suffering, and the earning capacity of the plaintiff before and after the injury. Upon consideration of all the evidence, facts and circumstances, the court finds that a verdict and judgment in excess of ten thousand dollars should not be allowed to stand in the case. Accordingly, if counsel for plaintiff in error will consent to a remittitur in the sum of five thousand dollars the judgment, as modified, will be affirmed; otherwise it will be reversed and a new trial ordered.

HAMILTON and CUSHING, J. J., concur.

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ACCEPTANCE AND PAYMENT OF A CHECK.

Court of Appeals for Cuyahoga County.

(Jones, P. J., Gorman and Hamilton, JJ., of the First District,
Sitting by Designation in Place of the Judges
of the Eighth District.)

PETRIE V. THE GARFIELD SAVINGS BANK CO. ET AL.

Decided, July 2, 1917.

*Banks and Banking—Check Deposited in a Branch Bank—Effect the
Same as Though Deposited in the Main Bank—Effect of Passing
to the Credit of a Depositor the Amount of a Check Drawn on the
Bank in Which it is Deposited.*

1. The deposit of a check in one of the branch banks of the banking company upon which it is drawn is the equivalent of depositing it in such company's main bank. This is true without regard to what the practice may be with reference to putting through the clearing house checks deposited in the branch banks.
2. Where a person in whose favor a check is drawn deposits such check in the bank upon which it is drawn, and the bank passes to the credit of such person in his checking account the amount of the check, such action on the part of the bank amounts not only to an acceptance but also to a payment of the check.

Walter J. Hamilton and H. H. Henry, for plaintiff in error.
error.

Ford, Snyder & Tilden, contra.

GORMAN, J.

Error to Common Pleas Court of Cuyahoga County.

The plaintiff in error, John R. Petrie, commenced this action against defendants in error in the common pleas court of Cuyahoga county. After filing a petition and amended petition, he filed by leave of court a second amended petition, in which he sets out that defendant is a corporation organized under the banking laws of the state of Ohio, and engaged in the general banking business in the city of Cleveland; that on the 17th day

of November, 1915, one James Lawson executed and delivered to plaintiff his check drawn upon the defendant bank for the sum of \$208, on account of services for work and labor performed by the plaintiff as a plumber; that at the time said Lawson executed and delivered to plaintiff said bank check, which was dated November 16, 1915, said Lawson had on deposit in one of the branch banks of the defendant company the sum of \$700. Plaintiff further avers that on the 18th of November, 1915, he deposited said check for \$208 in the defendant bank, at the Superior avenue and East 105th street branch, to the credit of his checking account, and at the time of such deposit said bank had to the credit of said Lawson in his checking account and subject to payment of plaintiff's check an amount more than sufficient to pay said check in full. Plaintiff further avers that on the 19th day of November, 1915, at 1:25 p. m., said James Lawson filed a voluntary petition in bankruptcy in the district court of the United States for the northern district of Ohio, eastern division, and was immediately thereafter declared a bankrupt under the bankruptcy act of the United States; that upon learning of the filing of said petition in bankruptcy said defendant bank refused payment of said check, charged plaintiff's account with the same, and returned it to the plaintiff unpaid, and now refuses to pay the same, though payment has been demanded by plaintiff.

Plaintiff set out other matters in his petition to the effect that said Lawson had received said sum of \$700 from the owner of the building which said Lawson was constructing, and had agreed and promised to deposit said money in the defendant bank for the purpose of paying the plaintiff and other workmen and materialmen who performed labor and furnished material on said building. He further averred that said fund was a trust fund and that he had an equitable interest in said \$700 to the extent of the amount of the check given him by said Lawson. Plaintiff further averred in his petition that the only claim which the defendant bank had upon said fund so deposited by Lawson, to-wit, said sum of \$700, arose from a note of \$400 made by said Lawson and his wife to said bank; but that the same was not

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due when the petition in bankruptcy was filed or when said fund was deposited.

Plaintiff prays that he may be found to have such equitable lien upon the balance in said bank to the credit of said Lawson at the time of the filing of the petition in bankruptcy as may be necessary to satisfy his said check, and that the bank may be ordered to pay such amount, to-wit, \$208, to plaintiff, and for all other relief that he may be equitably entitled to.

To this second amended petition the defendant demurred, and the court below sustained the demurrer and entered judgment in favor of the defendant, and ordered that the defendant go hence without day and recover its costs; to all of which the plaintiff excepted.

The principal question presented by the second amended petition and the demurrer thereto, which was not really argued by counsel in their briefs, but which was suggested by the court at the time of the oral argument, was this: Does the petition show, first, that the plaintiff was entitled to have the check credited to him as the bank credited it?

The averments of the petition show that the check given by Lawson to Petrie was not only accepted by the bank, but was paid, when the bank passed to the credit of Petrie's checking account the face value of the check, \$208. This can be construed in no other light than as an acceptance and payment, in view of the fact that the check was drawn on the defendant bank itself. If it had been drawn on another bank it might be claimed that the check was taken for collection. The mere fact that the check was deposited in one of the branch banks of the defendant company makes it no less a check drawn on the defendant bank, and, whatever the practice may have been or may be with reference to putting through the clearing house checks deposited in the branch banks, we hold as a matter of law that the deposit of this check in one of the branch banks of the defendant company was the equivalent of depositing it in defendant's main bank, and that it was a payment by it of said check when it credited Petrie's checking account with the amount of this check.

The negotiable instruments act, Section 8290, General Code, defines a check "a bill of exchange drawn on a bank payable on demand." And Section 8293 reads as follows: "When the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon."

Section 8290, General Code, further provides:

"Except as herein otherwise provided, the provisions of this division applicable to a bill of exchange payable on demand apply to a check."

Section 8237, General Code, provides:

"The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer."

We think there can be no question in this case but that when the branch bank of the defendant company passed to the credit of Petrie in his checking account the amount of this check, \$208, drawn by Lawson, it thereby not only accepted but paid the same. This transaction was the equivalent of paying over the counter to Petrie \$208, and Petrie immediately depositing the \$208 of currency to his credit in this branch bank.

The bank was not justified, the day following, in sur-charging Petrie's account with the \$208 which it had credited him on receiving the check the day before. Its only claim for doing this, under the averments of the second amended petition, arose from the fact that Lawson, the drawer of the check, had executed and delivered to the bank a note for \$400, which note was not yet due. If the note had been due or past due, and the bank had not accepted and paid the check, it would have had a right to offset the amount of its indebtedness of \$400 against the balance due Lawson in his checking account in the bank. But the bank in this instance was not entitled to set off the \$400 against Petrie's check, nor did it attempt to do so until the day after it had accepted the check and paid the same to Petrie. If Lawson had brought an action to recover the \$700 in the bank due him, the bank could not at that time by cross-petition have set off its \$400 note, because there was no set-off

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or claim due it at that time. The note had not yet matured, and it could only have a set-off in an action brought against it on a claim which had matured.

We think the principles here enunciated will be found fully discussed and approved in the following cases: *C., H. & D. Rd. Co. v. Metropolitan Natl. Bank*, 54 Ohio St., 60; *Metropolitan Natl. Bank v. Lloyd*, 90 N. Y., 530; *Oddie v. Natl. City Bank*, 45 N. Y., 735, 741; *Covert v. Rhodes*, 48 Ohio St., 66; *Bank v. Brewing Co.*, 50 Ohio St., 151, and *Blake v. Hamilton Dime Sav. Bank Co.*, 79 Ohio St., 189.

On the question of the right of the bank, the defendant in this case, to set off its claim against the amount credited to Lawson in its bank at the time he filed a petition in voluntary bankruptcy, see *Fuller v. Steiglitz, Assignee*, 27 Ohio St., 355.

For the reasons stated, we are of the opinion that the court of common pleas erred in sustaining the demurrer to the second amended petition; and we do not deem it necessary to consider the question raised by the second amended petition, that the \$700 deposit by Lawson was a trust fund, as there is nothing in the pleadings to indicate that the bank had any knowledge that the money was deposited as a trust fund.

Judgment of the common pleas court reversed.

Judgment reversed.

JONES, P. J. and HAMILTON, J., concur.

CONSTRUCTION OF AGREEMENT TO SELL LAND.

Court of Appeals for Licking County.

H. H. EDMUND V. MARY J. BORING ET AL.

Decided, October Term, 1918.

Covenant of Warranty—Agreement to Deliver a Warranty Deed—Is not a Covenant Against Incumbrances—Specific Performance—Protection of One Holding an Inchoate Contingent Right of Dower.

1. Where a contract for the sale of real estate binds the owner to make and deliver a warranty deed on a certain date, but contains no mention of a covenant against liens and incumbrances, the purchaser must be held to have agreed to take the land subject to such liens and incumbrances as were in existence at the time the contract of sale was executed, and the seller is entitled to receive the full amount named in the agreement without deduction for liens and incumbrances.
2. In such a case, it appearing that the husband of the owner did not sign the agreement to sell and in no way bound himself by the terms of the agreement, the land will be ordered transferred subject to his inchoate contingent right of dower.

Fitzgibbon, Montgomery & Black, and W. A. Hite, for plaintiff.

B. G. Smythe and L. G. Russell, contra.

POWELL, J.

This was an action commenced in the court of common pleas by the plaintiff to enforce specific performance of a contract for the sale of real estate, entered into by him and the defendant, Mary J. Boring, on the 5th day of July, 1917. Said contract is as follows:

“Article of agreement by and between Mary J. Boring, of Thornville, Ohio, party of the first part, and H. H. Edmund, of Thornville, Ohio, party of the second part, Witnesseth:

“Mary J. Boring, this day sells her farm in Bowling Green township, Licking county, Ohio, consisting of one hundred and eight acres, more or less, to H. H. Edmund for the sum of \$7,-

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500, and agrees to make and deliver a warranty deed on the 15th day of September, 1917, and she further agrees to take the same care of the farm and buildings as she has in the past. The said Mary J. Boring hereby acknowledges the receipt of \$300 as advance pay on the \$7,500 purchase money, leaving a balance of \$7,200, which H. H. Edmund agrees to pay in cash on the 15th day of September, 1917, when deed is delivered.

(Signed): "MARY J. BORING,

(Signed): "H. H. EDMUND."

An answer was filed by the defendant, Mary J. Boring; also an answer and cross-petition by the Peoples Bank of Thornville, setting up a mortgage lien against the premises for which contract of sale had been made.

The plaintiff filed a reply to the answer of the said Mary J. Boring, denying all the allegations of said answer inconsistent with the averments of the petition. •

The petition, in addition to setting out the facts relative to the contract of sale, recites the mortgage of the Peoples Bank and that the defendant, the Columbus Natural Gas Company, was the owner of liens or encumbrances against the farm agreed to be sold by said defendant, Mary J. Boring.

It will be noted that in the contract of sale, while Mary J. Boring agrees to make and deliver a warranty deed on the 15th day of September, 1917, it does not contain any agreement on her part for covenant against liens and encumbrances, and the question is made as to whether or not the liens and encumbrances against the farm were to be paid out of the purchase price to be received by the said Boring, or whether plaintiff bought the farm subject to such liens.

This court is of the opinion that, by a proper construction of the articles of agreement or sale, the said plaintiff, Edmund, will be held to have purchased said land subject to any liens or encumbrances then standing against it, as no provision is made therein that the farm should be conveyed to him clear and free of encumbrance or lien.

The husband of the defendant, Mary J. Boring, did not sign the article of agreement and nowhere bound himself to release his contingent inchoate right of dower in the land sold. It is

conceded, however, that his rights in said land are such that, while not an encumbrance but an interest in the land that may never accrue, the plaintiff, Edmund, should be required to take the land subject to such right of dower; but no question is made in the pleadings or evidence as to this.

The court of common pleas entered a decree for specific performance, but required the defendant, Mary J. Boring, to pay the amount of the mortgage lien against the land. This court is of opinion otherwise; that there being no covenants other than a covenant of warranty, which has been held to be a warranty of title only, plaintiff is not entitled to have the amount of the mortgage lien due the bank paid out of the purchase money before paying to the said Mary J. Boring the amount of the balance agreed to be paid to her, namely: the sum of seventy-two hundred dollars.

We hold that while the plaintiff is entitled to a decree for specific performance, such decree should be entered subject to the contingent right of dower of Allen Boring, husband of said Mary J. Boring, in said lands. Such decree will also be entered awarding said lands subject to the payment of any mortgage lien thereon at the time said contract was made, as well as any other claim or lien that may have been against said lands when said contract was entered into.

A warranty of title can not be enforced, unless the plaintiff is evicted from the lands by reason of a superior or paramount title, or something equivalent thereto.

The court of common pleas was without authority to order the amount of the mortgage lien to be paid out of the purchase money still due the said Mary J. Boring.

The decree of this court will be a decree for specific performance of the contract on payment by plaintiff of the agreed purchase price, subject, however, to the payment by the plaintiff of any liens or encumbrances existing against said land at the time said contract was made, or was to have been carried into effect, namely: September 15, 1917.

A motion for new trial, if one is filed, will be overruled.

HOUCK, J., concurs; SHIELDS, J., dissents.

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**IMPROPER CONDUCT TOWARD CUSTOMERS AS A GROUND
FOR DISCHARGE.**

Court of Appeals for Cuyahoga County.

**CHARLES F. ST. JOHN V. THE CLEVELAND COLLATERAL LOAN
COMPANY.**

Decided, February 2, 1914.

*Contract of Employment—Alleged to have been Terminated without
Cause—Error in Instruction to Jury as to Misconduct of Employee
Injuring the Business of his Employer.*

It is error to instruct a jury that salacious conversation on the part of the manager of a collateral loan company with certain female patrons would tend, as a matter of law, to injure the business of the company and afford ground for terminating the contract of employment, where the testimony tended to show that the conversations complained of were with women of easy virtue and the business of the company was in no wise injuriously affected thereby.

Mr. J. A. Fogle, Counsel for Plaintiff in Error.
Ammerman & Thompson, contra.

GRANT, J.

Error to the Court of Common Pleas.

This petition in error asks the reversal of the judgment of the court of common pleas. The parties are as they were below.

The facts as stated in the plaintiff's brief and its statement of his claim of error may be treated here as sufficiently accurate for the purposes of this opinion; they are as follows:

"On October 8, 1909, defendant by written contract, employed plaintiff as its general manager for the term of three years, at a salary of \$3,000 per year. The written contract was silent as to when the term began, but by the assent of both parties, plaintiff entered upon his duties under said contract on November 20, 1909, and continued to perform the same until

the 12th day of July, 1911, receiving his salary up to the last named date at the rate of \$3,000 per annum according to the terms of the contract. On the last named date he was summarily discharged by the defendant, and in due course he brought this action to recover damages for alleged breach of the contract in discharging him without cause. The defense set up in the answer, after admitting the contract of employment, of service thereunder and the payment of wages during the period of actual service, as alleged in the petition, proceeds as follows:

"For further answer defendant says that on the 12th day of July, 1911, plaintiff was discharged from the further service of the defendant company for cause in this, to-wit:

"First, because he failed, neglected and refused to devote all of his time, ability, energy, and attention to the business of the defendant company; second, because he failed, neglected and refused to obey and execute orders given by defendant company; third, because while in the employment and acting as general manager of the defendant company, he mistreated, misused and insulted numerous lady patrons by improper and indecent proposals and conduct toward them, to the great and irreparable injury of the business, good name, and reputation of the defendant company."

Plaintiff, by reply, denied the foregoing allegations of the answer.

Issue being thus joined, a trial was had resulting in a verdict for plaintiff, which was set aside by the court for errors of law, and upon a retrial a verdict was returned for the defendant, and judgment rendered thereon, and this proceeding is prosecuted to reverse that judgment.

Plaintiff claims that there was manifest error on the part of the court in its charge to the jury, which error was material and substantial and prejudicial to plaintiff's rights, and in addition to that plaintiff contends that the verdict and judgment is against the manifest weight of the evidence and is contrary to law.

Taking these assignments of error in the order of statement and the first is concerned with the charge of the trial court given to the jury in writing before argument, at the request of the defendant. It is as follows:

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“The court: The defendants have requested the court to charge the jury before argument, which request the court grants. The statute permits either party to give certain charges in writing. Of course, the court will charge you generally after the argument is over, but I give this special charge to you now: ‘If you find from a preponderance of the evidence that the plaintiff, Charles F. St. John, while acting as manager for the defendant company, did have any conversation with Mrs. Elizabeth Sexton, Mae Miller and Anna Lucas Jackson, or either of them, while such persons or either of them were patrons or borrowers of the defendant company, wherein it was proposed or suggested by him that they consent to improper relations with him, or if you find that he made or approved one or more loans from the defendant company to Margaret Smith, with the understanding or agreement that said loan was to be paid, in whole or in part, by her submitting to improper relations with him, then I instruct you, as a matter of law, that such conversation or conduct on his part would tend to injure the business of the defendant company, and would be sufficient cause for his discharge.’ ”

Instructions given in writing before argument are thought to be, and undoubtedly are, in some respects at least, of a more weighty and imposing character than the general and ordinary charge. They are to be with the jury in their retirement. They may not be enlarged or contradicted by any subsequent instruction, and to satisfy the requirements of the statute allowing them they must in all their parts state the law—no more and no less.

In this view of the matter, we think the charge complained of puts the case against the defendant much too strong, if it is to be measured by the real significance of the facts to which it purported to be applied. It said, roundly and as inerrant matter of law, that the tendency of the alleged talks, if they were proved, of the plaintiff with three named women, or with either one of them, was “to injure the business of the defendant company.” The defendant company was not running a Sunday school, nor was it a society for the promotion of social purity in Cleveland. Its business was something quite different; it was that of loaning money and, as a part of its name implies,

traps and calamities—alias the furniture of the dissolute as well as of the virtuous—were the securities with which it had to do. Its patrons must have included all sorts, and presumably among them the kind of people upon whom the alleged Lotharian proclivities of Mr. Saint John would not only produce no adverse impression, but on the other hand would be a positive allure-ment and incentive to do business of the kind pursued by the Cleveland Collateral Loan Company. The company was “out for the stuff.” All was grist that came to its mill. Common experience, or at least common sense, teaches that it trafficked in the necessities of the unfortunate, and the unfortunate, as is well known, include the morally loose and disreputable, who figure extensively in the kind of trade driven by the denizens of the underworld as well as the defendant company and its kind, much to the profit of the latter. The word “Saint,” crystallised in the plaintiff’s name, would not, probably drive one of these people from the friendly doors of the defendant, while to the holy it might be a recommendation and an advertisement. The word is a part of his name and does not signify, necessarily, his habits or proclaim his business as being saint-like. His namesake of old was so merciful that he said: “He that hath two coats, let him impart to him that hath none; and he that hath meat, let him do likewise.” A manager of a collateral loan company known as having such a name, might well be an attraction to both sorts.

Putting the worst construction upon what Mr. St. John is charged with having said to any of these women, and it is not easy to find in it the tendency which the court charged as matter of law was in it, beyond explanation or construction more charitable than the evil intent which the court imputed to it. And this is said bearing in mind that the injury which the company says it suffered because of St. John’s unsaintly talk was a business injury and not an injury to that which a corporation, and much less a collateral loan company in a large city, cannot have—morals. Of course the exuberant talk of Mr. St. John cannot have affected the business of the defendant injuriously—and an injury to it in a business point of view would alone justify his

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discharge—unless actual or intending customers were driven away by it. And to have been so driven away, disgusted or virtuous patrons must have known of it. There is no evidence in the record to show that they did, except in the cases of the women named—and of these presently. That the women told anyone of it does not appear. That St. John's alleged salacious conversations did not drive the women themselves from the defendant company, is clear. Mr. S. Sexton, while intimating that she did not like that kind of talk and that she made up her mind to be quit of the concern as soon as she could, on that account, seems to have thought better of it later. She says she called St. John personally by telephone three, or perhaps four times, asking for more time on her loan. This was not the conduct of a badly insulted woman, nor did it deprive, or tend to deprive, the loan company of a single intending patron, or drive off one already there.

To the same purport and of like undamaging effect, and, as we think, tendency, is what is said to have passed between St. John and Mrs. Miller. Mrs. Miller says she did not think his talk was "very nice"; but it does not appear to have acted as a deterrent to her dealing with the company. She went on negotiating for a loan, which she finally declined to take, not because St. John's talk was "not very nice," but because she thought that the ten dollars which this corporation of outraged moral sensibilities charged for the use of sixty dollars was more than she ought to pay. The company's virtue did not suffer by the occurrence, but remained inviolate for all that St. John did towards ruining it by his barren advances to Mrs. Miller.

Dickens makes Wackford Squeers, the Yorkshire schoolmaster, assure Mr. Snawley that he had "come to the right shop for morals," and such seems to have been the thought of Mrs. Jackson in the present case. She says that she simply paid no attention to what St. John said to her, but passed it off as perhaps a piece of rather awkward, or unhappily worded pleasantry—a construction which may be put upon it by a charitably minded person, doubtfully including a collateral loan company. At page 122 of the record Mrs. Jackson says:

“Q. If Mr. St. John made any suggestions to you or advances to you, Mrs. Jackson, I wish you would state what they were?

“A. He just naturally made a slight remark about making a little engagement, but I didn't pay any attention to it.”

And on page 124:

“A. I didn't pay any attention to it.”

So Mrs. Jackson was not disgustedly driven away from trafficking with the company by any supposed lapse from vitrue of Mr. St. John.

The case of Mrs. Smith alone remains. Her name is not so uncommon that the attention of intending dealers with the company would be likely to be attracted to it adversely to the latter if her alleged illicit commerce with Mr. St. John were known. But the transactions imputed to the two were of all things the least likely to become known. People who go about to do what they are charged with doing do not publish the fact in the newspapers or station a brass band in front of the house to proclaim what is going on within. Granting that Mrs. Smith was an underwordling, as is claimed, plying her avocation in Cleveland, and still the fact does not necessarily and as matter of law evidence the tendency postulated in the charge complained of, assuming also that she and St. John were guilty of improprieties as charged and that the fact was known in the circles in which Mrs. Smith moved. Indeed we think the tendency might be quite the other way and quite to the advantage of the loan company. For, assuming—as experience allows—that the patrons of loan companies are largely recruited from the purlieus of such places as Mrs. Smith is said to have kept, and it would be likely to follow that in those parts St. John might be accounted a pretty popular fellow, and one calculated, for his company, to do a stiff business. The charge against him in this case is not that Mrs. Smith's money would have been tainted money, if the company had got it, but that the company did not get it. If the complaint was that St. John instead of the company reaped the usufruct of the Mrs.

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Smith loan, that would be one thing; it might amount to an embezzlement of assets. But what is complained of is not an act but a tendency necessarily engendered by the act. We do not think that such tendency necessarily, or even probably, arose from what St. John is charged with having done—if he did it.

And St. John denies, point blank, all the delinquencies imputed to him. As to a good deal of it, after all, an innocent as well as evil construction may be put upon it. That is, the comparatively innocent construction that the talk was the inconsiderate outcrop of a badly regulated habit of thinking, sometimes observable in men after they have arrived at an age when such exhortations of speech cannot mean much more than talk, and which at worst are put forward tentatively rather than with danger of harmful action.

Upon all these considerations, it seems that the question of the tendency of St. John's alleged remarks and acts to injure the business and not the morals of the loan company, was one of fact to be resolved by the jury, under proper instructions, and not by the court, dogmatically and as matter of law.

That it was not left to the jury was error, to the clear prejudice of the party entitled to have it so left.

Error is also alleged as to the general charge. That charge in the respect complained of was in the following language:

“If you, therefore, find by a preponderance of the evidence in this case, and I have defined that to you, that the defendant on the 12th day of July, 1911, discharged the plaintiff for any one or all of the causes set out in its answer, or for any other just and reasonable cause, then I say to you that the plaintiff cannot recover in this action, and that your verdict should be for the defendant. If, however, from all the evidence in the case, you find that the defendant did not discharge the plaintiff from its employment for the reasons claimed by it and set up in its defense, in its answer, or for any other just and reasonable cause, then the discharge of the defendant would be a wrongful discharge, and without just cause, and your verdict should be for the plaintiff.”

Twice here the jury is allowed to defeat the plaintiff's claim "for any other just and reasonable cause," meaning thereby for a cause other than any alleged in the answer as a defense, and other than any to which the proof in the case was alone addressed. This is doing better by a litigant than he has seen fit to do for himself. "Ask, and ye shall receive," says the Scripture. Here the court says one may receive without asking.

Elsewhere in the charge the same thing is negatively stated thus: "And I say, as I have already said before, that if you find from all the evidence in the case that the reasons set up in defendant's answer were not the reasons why it discharged the plaintiff, and that those reasons did not exist in fact; and that it discharged the plaintiff without any good and sufficient cause, then the plaintiff would be entitled to recover in this action." And in still another place this negative statement is made. To give this in charge to the jury and not to cure it by anything to be found elsewhere in the instructions given, is absolutely error, prejudicial to the plaintiff.

Complaint is made as to the sufficiency of the charge as given in respect of the alleged defense that the plaintiff was inattentive to the business of his employer; it may be enough to say that no request was made to make the charge more sufficient. The charge covered the point—rather meagerly, it is true—but in the absence of a request to say more, it was enough.

We decline to disturb the judgment on the weight of the evidence. There was evidence fit to go to the jury which should have brought a right verdict if the instructions had been proper.

For the errors found the judgment complained of is reversed and the cause remanded for further proceedings according to law.

WINCH, J., and MEALS, J., concur.

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PAYMENT OF CLAIM OF TAX INQUISITOR ENFORCED.

Court of Appeals for Holmes County.

THE STATE OF OHIO, ON THE RELATION OF ED. A. BOWMAN, PLAINTIFF IN ERROR, v. THE BOARD OF COMMISSIONERS OF HOLMES COUNTY, OHIO, J. J. HERSHBERGER, AUDITOR OF HOLMES COUNTY, AND W. O. MILLER, TREASURER OF HOLMES COUNTY, OHIO, DEFENDANTS IN ERROR.

Decided, 1918.

Claims against Boards or Officers—Payment of, may be Enforced by Mandamus—Where Based on an Executed Contract—Board Making the Contract not a Necessary Party.

1. Mandamus is the proper form of action to compel payment of an amount due from a public board or officers under a contract which fixes the amount to be paid.
2. In the case of a contract executed by county commissioners with a tax inquisitor, providing for payment of a certain percentage of taxes collected on omitted property, mandamus lies to compel the county auditor to issue his warrant in payment thereof.
3. In such a case, allowance having been made in the contract for whatever claims might arise thereunder, the members of the board of county commissioners are not necessary parties.

Loren E. Wise, for plaintiff.

Wayne Stillwell, Prosecuting Attorney, for defendants.

POWELL, J.

This action is in this court on error to the judgment of the court of common pleas in a proceeding in that court in which the state of Ohio on the relation of Ed. A. Bowman seeks a peremptory writ of mandamus to compel the defendants, who are the board of commissioners of Holmes county, Ohio, and the auditor and treasurer of said county to take such proceedings as may be necessary to pay to the said Bowman out of the county treasury of said Holmes county twenty per cent. of a certain amount collected as delinquent taxes, through his efforts as tax inquisitor of said county.

The record discloses that said Bowman was formerly tax inquisitor of said county under a contract in writing between him and the defendant, the board of commissioners. The said contract provided that on the collection of taxes on omitted property in said county the relator was to receive for his compensation as such tax inquisitor twenty per cent. of the amount so collected. The petition alleges that an amount in excess of four thousand dollars had been collected on property omitted from the tax duplicate out of which he had not received his compensation as provided by said contract.

It is admitted in the answer that the contract was executed as claimed; that the amount as set forth in the petition for a writ of mandamus was the correct amount; that if said relator is entitled to any part of said taxes so collected as his compensation the amount alleged is the correct amount so that there is no question before the court save as to whether or not the claim is a valid claim, and whether or not the relator is entitled to a writ of mandamus requiring defendants to either allow and pay his claim, or that the auditor be required to draw a warrant for the payment of the same, to be paid by the county treasurer. It is contended on the part of the defendants that the action is improperly brought; that the claim as pleaded by the relator can not be collected in the way in which this action is brought, or in other words that the writ of mandamus is not the proper remedy for the collection of claims of the kind described in the petition.

This court, however, is of the opinion that where there is an amount due on contract from public officers or boards and such amount is agreed upon between the parties, and the properly constituted authorities to make payment of such amount refuse or fail to draw the necessary warrants or vouchers for the payment of the same, a writ of mandamus will lie to compel such payment.

Section 12283 of the General Code provides among other things that mandamus is a proper remedy to compel "the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Where a claim is pre-

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sented for payment arising out of a contract with the county commissioners, which provides for ascertaining the amount thereof when the services are performed or the obligation to pay the claim arises, mandamus is a proper remedy. In this case it was provided in the contract itself that the relator should receive twenty per cent. of the amount collected, and that it was the duty of the county auditor to draw his warrant for that sum whenever any omitted taxes were paid into the county treasury as a result of the efforts of such tax inquisitor under said contract, and it would be the duty of the county treasurer to pay the warrant so drawn by the county auditor. That is, the drawing of a warrant in such cases is an act enjoined as a duty resulting from the office of county auditor, and upon this record mandamus would lie against him to compel the same to be done. In cases where the amount claimed is to be ascertained by evidence, mandamus would not lie, but some of the other means of enforcing the collection of claims should be employed.

We think that the court erred in refusing to issue a peremptory writ as prayed for under the special provisions of Section 12283 above mentioned. We think further, that there is no necessity for the commissioners of said county to allow the claim sought to be collected as the allowance thereof had been provided for at the time of the execution of the contract, so that there was no duty arising in the case to be performed by the county commissioners and they were not necessary parties to the suit. We think also that the auditor's failure to perform his statutory duty in refusing to draw his warrant for the payment of the amount due on the delinquent taxes, requires that a writ issue against him requiring him to issue the warrant as prayed for in the petition herein.

It is the judgment of this court that the judgment of the court of common pleas, refusing the peremptory writ against the county auditor should be reversed, and as there are no disputed facts in the case requiring further adjudication this court will render the judgment that ought to have been rendered in the court below. It will therefor be the order and judgment of this court that a peremptory writ issue as prayed for re-

quiring the county auditor to draw his warrant on the county treasurer for the amount shown to be due said relator, as prayed for in the petition, and that the treasurer pay the amount of said warrant when so drawn, and the case will be remanded to the court of common pleas to carry this judgment of the court of appeals into effect.

Judgment accordingly.

SHIELDS, J., and HOUCK, J., concur.

VIOLATION OF AN INJUNCTION.

Court of Appeals for Hamilton County.

THE UNION REDUCTION CO. v. STORY.

Decided, July 9, 1917.

Nuisance—Violation of Injunction Against Maintaining of—Contempt Proceedings—Showing of Intention to Disregard Injunction Not Necessary.

1. In proceedings for the punishment of a defendant charged with violating an order of injunction, Sections 11887 and 11888, General Code, relating to contempt for violation of an injunction, are the proper sections to apply, and not the sections providing for the punishment generally of contempt of court.
2. If a person or corporation can not carry on his or its business without making it so offensive and and annoying to others who have property in the neighborhood as to deprive them of the enjoyment and healthful use of their own property, courts of equity should enjoin the continuance of the business entirely.
3. The intention to violate an injunction is not to be considered, if the injunction is actually violated.

Healy, Ferris & McAvoy and Peck, Shaffer & Peck, for plaintiff in error.

Kelley & Remke, contra.

BY THE COURT.

Error to the Court of Appeals for Hamilton County.

*For other proceedings in the same case, see 25 C.C.(N.S.), 533.

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This case is here on error to a judgment of the Superior Court of Cincinnati.

The action was brought by defendant in error, John Story, three years ago last October to enjoin the plaintiff in error from committing a nuisance by casting upon the premises of plaintiff, in and about his house, offensive and noisome odors and gases arising from the operation of a reduction plant in the western part of the city. Upon the hearing of the cause in the superior court the defendant was enjoined as prayed for in the petition. Upon error being prosecuted to this court the judgment of the lower court was affirmed. Thereupon counsel for The Union Reduction Company made application to the supreme court for an order directing the court of appeals to certify its record to the Supreme Court. This application was denied on May 29, 1916. On October 9, 1916, an application was filed in the superior court of Cincinnati, in the original case, for an order on the defendant to show cause why it should not be punished for contempt for its repeated violation of the injunction which had theretofore been entered by the court. A hearing was had, and at the conclusion of the evidence the court found the defendant, The Union Reduction Company, guilty of contempt of court for disobeying the injunction; and imposed a fine of \$200 and costs upon it in such contempt proceedings. Error is prosecuted to this court from that judgment.

It was claimed by counsel for The Union Reduction Company, in the case filed in the court below, that the proceedings to punish for contempt in the case should have been brought under Section 12137, General Code, which section provides generally for the punishment of indirect contempt for:

“1. Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer.

“2. Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions.

“3. A failure to obey a subpoena duly served, or a refusal to be sworn, or to answer as a witness, when lawfully required.

“4. The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him.

“5. A failure upon the part of a person, recognized to appear as a witness in court, to appear in compliance with the terms of his recognizance.”

The trial court ruled that the proceedings in contempt in this case did not fall under the provisions of Section 12137, but under the special provisions in Sections 11887 and 11888, General Code, providing for the punishment, as for a contempt, of the violation of an injunction or a restraining order.

In this holding we are of the opinion that the trial court did not err, but that these special provisions, Sections 11887 and 11888, relating to contempt for violation of an injunction, are the proper sections to apply to this case, and not the sections providing for the punishment generally of contempt of court. It is elementary law that where there are special statutes relating to a matter they will govern to the exclusion of a general statute touching the same subject-matter.

It is further claimed by plaintiff in error that the rule of evidence to be applied in cases of this kind is the rule applied in criminal cases, to-wit: that it must be established beyond a reasonable doubt that the person charged with the commission of the contempt was guilty. We think it is very doubtful, to say the least, that this rule should be applied in case of a charge of contempt for the violation of an injunction. However that may be, the trial court ruled with the plaintiff in error,—that the evidence must show beyond a reasonable doubt that the plaintiff in error was guilty of contempt,—so that whether or not that was the proper rule to apply, plaintiff in error can not complain, as it had the benefit of the rule which it invoked.

The only other question in the case is whether or not the judgment of the court below was against the weight of the evidence. There were nineteen witnesses heard on the charge of contempt, many of them living near this reduction plant and others living as far away as two or three miles. Without undertaking to analyze the testimony, suffice it to say we are clearly of the opinion that the court was warranted, under the evidence, in finding that the plaintiff in error beyond a reasonable doubt

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had violated the injunction. We think the evidence clearly established that the plaintiff in error had not done all that it could to eliminate the noxious and nauseating vapors which rendered the property of plaintiff, Story, almost uninhabitable.

It may be said in passing, as has been frequently said in nuisance cases, that those businesses which can not be conducted without being so obnoxious and noisome to the property owners in the neighborhood as to amount to a nuisance should not be permitted to be conducted at all. If a person or corporation can not carry on his or its business without making it so offensive and annoying to others who have property in the neighborhood as to deprive them of the enjoyment and healthful use of their own property, courts of equity should enjoin the continuance of the business entirely.

It is further claimed in the case that the plaintiff in error showed no intention to violate the injunction issued by the court and for that reason should not be punished as for contempt of court. We think the intention to violate the injunction is not to be considered, if the injunction was actually violated. The thing forbidden was the operation of the plant in a manner to create an injurious nuisance to the plaintiff Story, and this nuisance might well arise from the failure of the reduction company to do all that it could to operate its plant in a proper manner, by its passive negligence; or it might result from the commission of active wrongs in the operation of its plant. It was bound to take precaution to prevent the nuisance which the court had enjoined, and if the nuisance actually resulted from the operation of the plant it could not be a defense or an excuse that the defendant did not intend to create a nuisance. 2 High on Injunctions (4 ed.), Section 1418, lays down this rule:

“The violation of an injunction constitutes a contempt of the court from which it issued, and will be punished accordingly. Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation.”

See also *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. Rep., 972, where it is said at page 975:

“The breach of the injunction consists in doing or failing to do the thing commanded, and not in the intention with which the act was done.”

Upon a careful review of the case, we are of the opinion that there was no error committed by the trial court prejudicial to the plaintiff in error, and the judgment is therefore affirmed.

Judgment affirmed.

JONES, GORMAN and HAMILTON, JJ., concur.

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Richland County.

DEATH CAUSED BY FREEZING IS AN "ACCIDENTAL DEATH."

Court of Appeals for Richland County.

**THE COMMONWEALTH CASUALTY COMPANY OF PHILADELPHIA v.
MELISSA WHEELER.***

Decided, April 18, 1919.

Accident Insurance—Voluntary Exposure to Cold not a Bar to Recovery under an Accident Policy Covering "Freezing"—Where the Result of the Exposure was Wholly Unexpected and did not Follow as the Usual Effect of a Known Cause—Or where not a Natural or Probable Cause—Indemnity from Bodily Injury through Accidental Means Resulting Directly, Independantly and Exclusive of all Other Causes.

A foreman, while walking from the factory to his home with the thermometer 20 degrees below zero, found that his face was frozen, and stopped at the home of his daughter where he died a few minutes later. His physician testified that he was "frozen to death from exposure," and the record showed no antecedent physical injury. The company defended on the ground that even if it were true that he died as a result of freezing, no liability attached for the reason that he voluntarily exposed himself to the cold and his death, therefore, was not due to an accident.

Held: That upon reason and authority his death was due to "accident" within the meaning of the policy.

Harry T. Manner for plaintiff in error; *McBride & Wolfe*, contra.

SHIELDS, J.

In the court below the defendant in error, as beneficiary under a certain policy of accident insurance issued by the plaintiff in error to one C. Y. Wheeler, brought suit to recover of the plaintiff in error the sum of \$600 for the death of the said C. Y. Wheel-

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 7, 1919.

er which occurred January 12, 1918, as the result of an accident from freezing while returning to his home on said day from his usual occupation and place of employment.

It is averred that his death was caused solely from freezing and due directly to "such injury" and that at the time of "such injury" and death, said policy was in full force and effect by the payment of premiums due thereon from time to time; that during his lifetime the said C. Y. Wheeler, and his wife, the said Melissa Wheeler, beneficiary under said policy, since the death of the said C. Y. Wheeler, each duly performed all the conditions of said policy on their part to be performed, and that although requested, the plaintiff in error has refused and failed to pay the amount named in said policy according to its terms, and judgment is prayed for.

Said company filed an answer admitting that the said Melissa Wheeler is the widow of the said C. Y. Wheeler, deceased, and that she was named as the beneficiary in a certain insurance policy issued by said company, and except that said company is a corporation authorized to do business in this state, a general denial of the allegations in said petition is made.

For a second defense, after reciting the provisions of said policy contained in Sections 1 and 2 under the insurance clause therein, said company denies that the cause of death of the said C. Y. Wheeler falls within the intent and meaning of said Section 1, and further avers that "whatever injuries the said C. Y. Wheeler may have sustained, if any, were not caused from freezing to death as alleged in the petition of the plaintiff, and the same was not covered by the terms of said policy."

For a third defense said company avers "that the said C. Y. Wheeler died by reason of sickness and a diseased condition, and not as a result of any accident, and had defaulted in his premiums due said company."

For a fourth defense said company avers that in the application made by the said C. Y. Wheeler for said policy of insurance, he stated, among other things, that he had never had any form of heart trouble, when in fact said statement was untrue,

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and that the said C. Y. Wheeler had heart trouble and was not in sound condition of health at the time he made application; that he had on other occasions been treated for heart trouble and that at the time said application was made the same was unknown to the defendant company but was known to said decedent.

For a fifth defense said company, after pleading the provisions of said policy in "C" under "Additional Provisions," avers that the said C. Y. Wheeler "did expose himself to obvious risk of injury or known danger which indirectly caused his death by reason of the weakened condition of his heart * * * that his death was not caused directly by said exposure, but the same was only the indirect cause thereof; that his death was caused directly by his diseased condition, and that if any liability exists under this policy, under the terms thereof, the limit of liability would not exceed one month's indemnity of \$60 and no more."

In a reply the plaintiff below admits that said policy contained the provisions quoted in said defenses Nos. 2, 3 and 4 in said answer, but denies each and every other allegation therein contained.

Upon the submission of the case to a jury, a verdict resulted in favor of the plaintiff below, and upon a motion filed for a new trial, including a motion for judgment for the defendant below notwithstanding said verdict, said motions were overruled and judgment was entered upon said verdict. A petition in error was filed in this court containing numerous assignments of errors for a reversal of said judgment.

The principal contention made on behalf of the plaintiff in error in argument was (1) that the death of the insured was not caused alone from freezing, as shown by the evidence, and therefore a liability on the part of said company does not arise under the terms of said policy; (2) or if his death was so caused, that it was caused by voluntary exposure to an obviously known danger, and therefore the indemnity named in said policy is not recoverable.

After reciting the consideration and premium paid and the statements made in the application for the issuance of said pol-

icy, it is provided therein that said company "does hereby insure C. Y. Wheeler of Mansfield, State of Ohio, * * * against:

"(1) The effects resulting directly and exclusively of all other causes, from bodily injury sustained during the life of this policy solely through external, violent and accidental means (suicide, sane or insane, not included), said bodily injury so sustained being hereinafter referred to as 'such injury' * * * which said section with Section 2 provide for the amount of indemnity to be paid for specific losses expressly mentioned therein."

Section 5 of said policy under "special rate indemnity," provides:

"If loss of life of the insured shall within ninety days from the date of exposure or infection, result solely from sunstroke, freezing or hydrophobia, due directly to 'such injury,' or if loss of life shall result solely from accidental drowning, the company will pay the full original principal sum."

As stated, under the defenses set up in Nos. 3, 4 and 5 in said answer, it is averred, among other things, that the said C. Y. Wheeler died by reason of sickness and disease, and that he was suffering from a weakened condition of his heart and that at the time he made application for said policy of insurance he falsely represented his condition of health. Under the facts disclosed in the record, we find no foundation whatever supporting these allegations.

It is charged in the petition that the death of the said C. Y. Wheeler was caused solely by freezing from exposure to the severe cold. It appears that the weather on the day of his death was about 20 degrees below zero; that on that morning he left his home in his usual health, walking some two and a half miles to a manufacturing industry in the city of Mansfield, Ohio, of which he was foreman; that on his return homeward before noon of said day he stopped on his way at the home of his daughter, after walking perhaps some two miles, and on entering his said daughter's home he spoke of the severity

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of the weather and complained of portions of his face being frozen. Drawing near to a fire, he laid aside his mittens and hat, unbuttoned his outer coat, and after sitting on a chair and conversing for a period of about five minutes, he suddenly and without warning fell to the floor. A physician was quickly summoned who pronounced life extinct. Counsel on behalf of plaintiff in error argued that the death of said decedent was not shown to have been caused solely by freezing, that the pathological history of his case showed that he was afflicted with other ailments which contributed to his death. It is said that medical science is but an aid in determining the cause of one's death, and that in some cases at least, it appears to be beyond the domain of science or the power of human agency to define absolutely the cause of death, but without here theorizing and without discoursing the generally accepted opinion of the office and experience of the medical profession in this respect, when we consider the state of said decedent's health on that morning prior to his death, as already indicated, the intense cold and the declarations of his physical condition when he entered his daughter's home, as testified to by the witnesses Thomas Dickerson and Ella Dickerson, his wife, the discoloration of his face and neck and certain portions of his body, and the opinion of Dr. R. R. Black, his former family physician, who testified that "he was frozen to death from exposure," we do not hesitate to say that in our judgment the jury on this issue might well find that said decedent's death was due to freezing as described in the plaintiff's petition.

Under the head of "Standard Provisions" it is provided in Section 8 of said policy that,

"The company shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law."

Here it appears that notice of the death of said decedent was given to the plaintiff in error soon after said death, and it

likewise appears that no autopsy was made by said company, nor was any requested to be made.

It was further argued on behalf of the plaintiff in error, and as is averred in the second defense of said answer, that whatever injuries said decedent may have received by reason of his exposure on the day in question "the same were not covered by the terms of said policy." It is scarcely necessary to state that the application made to said company by the said decedent in his lifetime was for a policy of indemnity to cover accidents, that such was contemplated by the contracting parties and that such a policy was issued to the insured. Commenting on the object and purpose of the contract for this kind of insurance, it is laid down in Vol. 1, Wood on Insurance, 2nd Ed., p. 146, that:

"Indemnity is the real object and purpose of all insurance; that is what the assured bargains for, and what the assurer intends to provide.

"The predominant intention of the parties in a contract of insurance is indemnity, and this is to be kept in view and favored in putting a construction upon a policy. Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumedly the intention of the insurer that the insured shall understand, that in case of loss, he is to be protected to the full extent which any fair interpretation will give. The spirit of the rule is, that when two interpretations, equally fair, may be given, that which gives the greater indemnity shall prevail."

Here the insurance contract in the section heretofore referred to expressly provides for indemnity against death from freezing, hence the duty of construction does not arise and the rules which are designed to aid doubtful meanings require no discussion, but if there was room for such discussion, such construction should be observed as would not defeat the intention of the contracting parties. *Insurance Co. v. Myers & Co.*, 62 O. S., 529.

Of course the contract is to be considered as a whole, in all of its parts, and the general insuring clause, Section 1, providing

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against "effects resulting directly and exclusively of all other causes from bodily injury sustained * * * solely through external, violent and accidental means" is to be considered in connection with said Section 5 providing for indemnity from freezing. We are then met with the inquiry, was the death of the said decedent caused "solely through external, violent and accidental means? Both lexicographers and courts have defined the different words here used, and we find no difficulty in ascertaining their meaning, the term "accident" being defined as "an event that takes place without one's expectation"—"an undesigned, sudden and unexpected event"—"an event which proceeds from an unknown cause or is an unusual effect of a known cause, and therefore unexpected." The term "accidental means," as employed here, as we understand it, means accidental cause, "means" and "cause" being intended to be used interchangeably. In the case of *U. S. Mut. Accident Assn. v. Barry*, 131 U. S., 100, 121, which was an action on an accident insurance policy, Mr. Justice Blatchford in speaking for the court in that case, when referring to "means" in connection with "accidental" says:

"That the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it can not be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

See also *Bryant et al v. Continental Casualty Co.*, 107 Texas, 582, 585, *et seq.*

With "means" and "cause" thus used synonymously, and so understanding them, applying the testimony of the witnesses heretofore mentioned to the facts and circumstances immediately preceding said decedent's death, the solution of the main question presented here is relieved of much difficulty.

Recurring to Section 5, which provides that "if death shall * * * result solely from sunstroke, freezing, hydrophobia or drowning due directly to 'such injury,' the company will pay the full sum named in said policy," all of these several questions are enumerated in the same paragraph in said section, for either of which, said policy provides that said company shall be liable for said sum in case of accidental death. It might well be asked why these specified causes were inserted in and made a part of the insurance contract, unless they were to be complied with, and if not complied with, why they should not be enforced in case of death by accident the same as any other provisions of said contract? Why was freezing inserted in said policy, unless it was intended to be among the risks assumed by said company and therein named as a form of bodily injury, if in the construction of the policy, as now argued, it is to be considered something other than a risk and therefore not embracing any element of bodily injury? In this connection and in addition to the quotation from Wood on Insurance already given, we herewith also quote from the opinion in *Pack v. Prudential Casualty Co.*, 170 Ky., 47, 54, which was an accident insurance case and the policy issued by said company contained similar provisions to the policy here sued on, including freezing, the judge announcing the opinion of the court in that case in commenting on the clause in the policy providing for indemnity against accident and the object of the insured in taking out said policy says:

"Unless the clause in this contract providing indemnity against sunstroke is construed to embrace cases like the one we have, it is deceptive and misleading and fails to afford the protection its reading implies. If an insured who should suffer sunstroke when engaged in his usual occupation or in doing the things he usually does, is not to be protected by this clause in the policy, it has little beneficial meaning, for, according to the construction contended for, the insured would not be protected in any state of case unless the sunstroke happens while the insured was by accident or misfortune involuntarily placed in a position or surrounded by conditions that would subject

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him to the rays of the sun in an unexpected and unforeseen manner.

“It is of course true that sunstroke suffered in this way would be accidental, but not more so than would sunstroke suffered under ordinary conditions when it could not be reasonably anticipated or foreseen that it would happen.

“The very purpose of accident insurance is to protect the insured against accidents that occur when he is going about his business or attending to his work or affairs in the usual way without any thought of being injured or killed, and when there is no probability, in the ordinary course of human experience, that he will meet with accident or death. The reason why men secure accident insurance is to protect them against unforeseen and unexpected accidents that may happen in the ordinary course of their lives and when they are pursuing in the usual way their daily vocations, or doing in the ordinary way the things that men do in the common, every-day affairs of life.

“Nearly all accidents happen when people are going about their business in the usual way and are voluntarily doing the things before them to do. There are many clauses in this policy protecting the insured against accidental injury or death, and if the argument of counsel is sound when applied to the sunstroke clause in the policy, there seems no good reason why the construction contended for should not embrace all of the other indemnity features, with the result that the insured would find himself without protection against the very things for which he secured the insurance as indemnity.”

To our minds, freezing was designated as one of the risks covered by said policy. Without extending this discussion further, it is sufficient to say that in our judgment these different clauses were inserted in said policy for a purpose—for the protection of the insured—and relying on said company's written promise to pay the full indemnity in case of accidental death, said policy was accepted and the premium due thereon was paid by the said decedent.

Although it appears that the said decedent was up to the time of his sudden death engaged in his usual business and work, returning to his home on the day in question, as was his privilege, with no antecedent physical injury suffered by him on said day or before, so far as the testimony shows, but counsel

for said company urge that he voluntarily and knowingly exposed himself to the intense cold and did just what he intended to do—to return to his home when he knew of the state of the weather and thereby invited the result which befell him. True it is reasonable to suppose that he knew of the state of the weather in view of his going to work that morning, but it appears also that he was comfortably clothed with reference to such weather, and for aught that appears he may have walked the same distance under like conditions of weather before that time. In their brief counsel for plaintiff in error quote the following from what is known as the cold plunge bath case, the *New Amsterdam Casualty Co. v. Johnson, Admr.*, 91 O. S., 155, 159, as tending to show that death was not caused by “accidental means,” wherein Chief Justice Nichols in announcing the opinion of the court says:

“The attending physician in the case at bar says that the result which followed the bath, while unusual, was yet the direct and natural effect of the voluntary immersion of the body of the insured. The insured did nothing but that which he intended to do. He planned for and deliberately entered on the project and, so far as appears, it was carried out precisely as intended. He did not slip or fall.”

The principles of law applicable to the foregoing case are not, in our judgment, applicable to the case at bar. There the insured after being out horseback riding and on returning to his home took a cold plunge, as had been his custom, and that in consequence of the shock caused to his system, by contact externally of the cold water in said plunge with his body, an acute dilation of the heart followed for several weeks. It will thus be seen that the insured in that case deliberately planned and created the condition that caused his death, a different condition from the case before us and clearly distinguishable from it, as we see it. Here the undisputed testimony is that the insured was returning to his home from his place of employment in his usual way, apparently unconscious

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of any danger from any exposure to the cold, with no apprehension of injury on that account, and doing nothing under his control to invite accident or injury before he was stricken as stated. His exposure to the cold may have been voluntary, but the result was wholly unexpected and did not follow as the "usual effect of a known cause." It was not the natural and probable consequence" thereof as was held in *U. S. Mut. Accident Assn., v. Barry*, already cited. See also *U. S. Mut. Accident Assn., v. Hubbell*, 56 O. S., 516.

In the course of the hearing we were not cited by the plaintiff in error to any adjudicated case involving accidental death from freezing, nor have we been able to find any such reported case, but the following cases of sunstroke were cited, which in principle, in our judgment, are analogous to the case at bar and which contain a statement of the law applicable to said case and are of controlling effect, although it is but proper to state that courts in different jurisdictions in their holdings on this subject are not uniform; especially is this true as between the federal and state courts.

In *Gallagher v. Fidelity & Casualty Co., of N. Y.*, 148 N. Y. Supp., 1016, which was a case of sunstroke, said company issued its policy of accident insurance insuring the person named therein "against bodily injury * * * through accidental means (excluding suicide, sane or insane, or any attempt thereat) and resulting directly, independently and exclusively of all other causes. Among others, sunstroke and freezing were defined in the insuring clause of said policy to be "bodily injury" within the meaning thereof. Here it was admitted by the defendant company that the insured suffered a sunstroke, but having exposed himself voluntarily, it was claimed that death of the insured was not due to "accidental means" within the terms of the policy. Upon an appeal taken to the appellate division of the supreme court, said court held that:

"An accident policy, insuring against bodily injury from accidental means, provided that sunstroke, suffered through accidental means, should be deemed bodily injury. Insured,

after being exposed to the sun's rays in the necessary conduct of his business, suffered a 'sunstroke' which is defined as an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays, or to overheated air. Held, that, as insured while intending to be in the sun did not intend to produce a sunstroke; the sunstroke was an 'accident' which is an event that takes place without one's foresight or expectation, and hence was within the policy, being produced by 'accidental means' which are agencies that produce effects that are not their natural and probable consequences; the requirement that the sunstroke be produced by accidental means not requiring an accident to precede the sunstroke."

The above case was afterward taken to the Court of Appeals of New York, which court affirmed the judgment of the court below. 221 N. Y. Court of Appeals, 664.

Bryant et al v. Continental Casualty Co., 107 Texas, 582, already cited, an interesting and instructive case, contains a lengthy discussion of the different phases of accident insurance law and cites numerous authorities pertaining thereto. The case was one of sunstroke or heat prostration, and the policy of insurance sued on, after providing against personal bodily injury "effected directly and independently of all other causes through external, violent and purely accidental means," also provides:

"If sunstroke, freezing or hydrophobia, due in either case to external, violent and accidental means, shall result, independently of all other causes, in the death of the insured within ninety days from date of exposure or infection, the company will pay said principal sum as indemnity for loss of life."

It was held by the Supreme Court that:

1st. Syl. "Under a policy insuring against death from 'bodily injury effected directly and independently of all other causes, through external, violent, and purely accidental means,' with provision, under the title 'Special Accident Indemnities,' for payment in case of 'sunstroke * * * due * * * to external, violent and accidental means, shall result, * * *

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the beneficiary could recover for the death of insured from sunstroke suffered on a warm afternoon while walking the city streets in the ordinary course of his occupation as a collector of accounts.

4th Syl. "Treating sunstroke as a form of bodily injury, rather than a disease, it should be considered as due to 'accidental means' where the result was something unforeseen, unexpected, and out of the ordinary course, though arising from voluntary exposure of himself by insured to solar heat."

Quoting from the opinion in said case, on p. 594, Chief Justice Phillips says:

"A large number of the injuries, plainly accidents, are suffered in the performance of intentional acts. Whether the immediately preceding act was intentional, is a mistaken point of the question. The proper and true test, in all instances of voluntary action, is that defined in the Barry case (heretofore referred to); if in the act which precedes the injury, though an intentional act, something unforeseen, unexpected and unusual occurs which produces the injury, it is accidentally caused."

Continental Casualty Co. v. Clark, reported in the advance sheets of the Pacific Reporter under date of July 22, 1918, Vol. 173 Oklahoma, 453, was an accident insurance case as its title implies, and Paragraph 4 of the insurance contract provided that:

"If sunstroke, freezing, or hydrophobia, due in either case to external, violent or accidental means, shall result, independently of all other causes, in the death of the insured within ninety days from the date of the exposure or infection, the company will pay said principal sum as indemnity, for loss of life."

In affirming the judgment of the court below, the Supreme Court held that:

"In an accident insurance policy which provides 'If sunstroke, freezing, or hydrophobia, due in either case to external, violent or accidental means, shall result, independently of all

other causes, in the death of the insured within ninety days from the date of the exposure or infection, the company will pay said principal sum as indemnity for loss of life,' held, that 'accidental means' is used to denote 'accidental cause,' and in case of sunstroke, if the same was suffered while the insured was engaged in his usual avocation or going about his affairs in an ordinary manner as any other person might have been under like or similar circumstances, and did not intentionally and voluntarily subject himself to an intense heat calculated to produce sunstroke, with the knowledge that it would probably occur, then the sunstroke was suffered from 'accidental means' or 'accidental cause,' within the meaning of the policy."

The judge announcing the opinion in said case when commenting on said paragraph 4, at page 455, says:

"In view of the mechanical construction of paragraph 4 of the contract in question in placing sunstroke, freezing, and hydrophobia in the same paragraph and providing that in case of death caused by either due to external, violent, and accidental means the company would pay the principal sum as indemnity for loss of life, it being so very apparent that, if deceased had lost his life by freezing in such a way that death from said cause was without insured's expectations or was undesigned by him, or was an unusual happening from a known cause, the liability of the company would have been fixed and established, and this would have been true had deceased lost his life by hydrophobia, then why not when death resulted from sunstroke? Was not the sunstroke suffered by the deceased an event that took place without his expectation, undesigned and unexpected? Is not this the reasonable construction to place on this contract, in the light of its context? If not, why was it placed in the same paragraph with the other two diseases or injuries, whichever you are pleased to call them, requiring this particular construction? To place any other construction upon this feature of the liability assumed by the company would practically read it out of the contract; and we therefore hold that inasmuch as the evidence tended to show that the deceased on the day in question was going about his affairs in an ordinary manner, was engaged in no unusual or unnecessary exposure, and the sunstroke was without the expectation of the insured, was undesigned by him, and was an unusual happening, the

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same was suffered by 'external, violent, and accidental means' within the meaning of the policy; and we accordingly hold that the defendant was liable upon this contract under the evidence adduced at the trial."

Other cases were cited by counsel, sustaining the same doctrine laid down by the foregoing authorities, but which we do not deem it necessary to analyze or refer to. As against these, authorities are cited by counsel for plaintiff in error upholding a contrary doctrine in which sunstroke is held to be a form of disease and classifying freezing in the same category of alleged accidents as sunstroke, counsel contending that freezing, as here claimed and shown, does not fall within the terms of the policy sued on. As before stated, while the decisions of the courts have not been uniform in their holdings on this question, we are of the opinion that upon both reason and principle the weight of authority is that the cause of death here ascribed, to-wit. "freezing," disassociated with all other causes, is death suffered from accidental means or accidental cause within the meaning of said policy.

Counsel for plaintiff in error urged that the court below erred in permitting one W. C. Wappner, a witness for the plaintiff below, to give to the jury his opinion as to the cause of death of the insured (see p. 15 of bill of exceptions). The witness testified that he had been engaged as undertaker and embalmer for some ten years and had known the said decedent for that period of time, and that he prepared his body for burial in the early afternoon of the day of his death. After describing the physical condition of decedent's face, neck and body, he was asked if he could give the cause of decedent's death. The record shows that this question was objected to, and on being overruled an exception was taken. Thereupon the witness answered, "I judge that he was frozen to death." While perhaps the witness did not qualify as an expert, his answer was not responsive to the question asked, and had he first stated that he could give an opinion, his answer was only a qualified one, and further, his testimony was cumulative at most. We

do not regard the action of the trial court as working any prejudicial error to the interests of the plaintiff in error.

In the petition in error one of the grounds of error assigned therein is that the trial court erred in its charge to the jury, and in their argument counsel for plaintiff in error argued that said court refused to give in charge to the jury a certain request submitted on behalf of the defendant below. While the bill of exceptions recites that "counsel for defendant requested that the court charge the jury before argument, which request was granted," we find no copy of such request set out in or attached to the bill of exceptions, and it nowhere appears that such request, if made, was in writing, which must affirmatively appear to insure action thereon by a reviewing court.

Under the foregoing review of this case, we deem it unnecessary to state that we find no error in the action of the court below in overruling the motion of the defendant below to direct the jury to return a verdict for the defendant at the close of the evidence given on behalf of the plaintiff below and renewed at the close of all the evidence in the case, nor in overruling said defendant's motion for a new trial, nor its motion for a judgment in its favor *non obstante veredicto*, nor do we find any prejudicial error in the charge of the court to the jury, nor in the record, and so finding, the judgment of the Court of Common Pleas will be affirmed, with costs.

Exceptions.

HOUCK and PATTERSON, JJ., concur.

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CONSTRUCTION OF THE WORDS "OPPOSITE POLITICS."

Court of Appeals for Lorain County.

R. T. REEFY, A TAXPAYER, v. THE CITY OF ELYRIA ET AL.

Decided, October 14, 1913.

Newspapers—Qualifications of, for Publication of Municipal Advertising—Where the Statute Requires Papers of "Opposite Politics."

Whether two newspapers are of "opposite politics," within the meaning of the statute relating to municipal advertising, will be determined by their conduct and policy at a time when partizanship has sway and party organization and discipline finds expression in party platforms and declarations, rather than during a period when party feeling is quiescent and there is little or no political activity; and where a municipality enters into a contract for such advertising during the year following a presidential campaign, the question whether the two papers chosen are opposite or antagonistic in politics will be judged by their record during the campaign of the preceding year.

GRANT, J.

This is an appeal from the judgment of the court of common pleas.

The petition alleges that the city of Elyria attempted to contract with the defendants, the Republican Printing Company and the Chronicle Printing Company, respectively, for the printing by them of such matters and things as are by law required to be published in newspapers, pertaining to the affairs of said city, exclusively. These purported contracts are said to be illegal and void, and the prayer of the petition is that the execution of them and all payments under them be forbidden and enjoined.

This claimed illegality in the contracts awarded arises—so it is said—from the fact that the newspapers published by the defendants named, namely, the *Evening Telegram*, published by the first named, and the *Elyria Chronicle*, published by the latter of the two, are not newspapers of "opposite politics," as they are required to be by the law permitting the contracts in question

to be made. This is the sole issue appearing in this appeal, and it is the only question that will be discussed in this opinion. It is a matter of fact, to be determined upon all the circumstances of the case.

We say now, as we said at the argument, that the standard of political orthodoxy by which we shall measure the quality of these two newspapers as to whether they are "opposite" within the contemplation of the statute, will be their conduct and affiliations in the political campaign of 1912, and not their claims and asseverations now. We are not here to conduct a *post mortem* examination nor to administer "crowner's quest law." The time when those who seek the benefits of a course of conduct should speak or keep silent is when speech or silence is called for, and not when either will be inert. With newspapers as with men, "By their fruits ye shall know them," and "In the place where a tree falleth, there it shall lie."

It is not pretended that "politics," as used in the statute under which the contracts attempted to be awarded are allowed, is the word in its broad sense of comprehending the whole scope and office of government. It is used, all will agree, in its restricted sense of partisanship. Thus considered, the word signifies party preference and connection. It lives and exercises its force and brings its power to bear, through party organization and discipline and finds expression in party platforms and declarations of principles and in the utterances of candidates and leaders. In 1864 General McClellan openly repudiated the platform on which his party had placed him as its candidate; nevertheless, he claimed and had the allegiance of his party and was the incarnate exponent of its politics at the polls.

The word "opposite," when employed as the statute in question employs it, means antagonistic, having a different tendency, quality or character. Contrary is, perhaps, the most expressive as well as the most correct verbal equivalent by which the underlying concept of opposition can be voiced; it is, at least, sufficient for the purpose of this case. It does not permit a twilight zone in which, or under the shadow of which, neighbor Garford, or townsman Sharp may be supported by a paper masquerading as

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a political enemy to their party. It is not allowable, under this definition of the vital word, to make merchandise of journalistic agencies by selling space to the minor candidates of one side while posing as the party exponent of the other side, in good and regular standing. What the statute clearly means is—"He that is not for me is against me; and he that gathereth not with me scattereth abroad."

Brought to this plain and easy test, and measured by its requirements, how stands the case at bar?

In the campaign of 1912 there were—among all—at least two political parties before the people of this nation and of Ohio and in every county in it. These two parties were known and designated as the Republican and Reform parties, respectively. Each had its candidates, state and national, each had fulminated its declaration of principles, and each was fighting for votes against the other. Not only were they antagonistic—contrary—to each other on paper and in the abstract, but it is too well known for dispute that in the concrete and in the persons of the candidates and down to the lowest stratum of their followers, they were at deadly enmity with one another. The feud was extremely bitter all down the line, from Taft and Roosevelt to the humblest job-hunter in Poorcuss county and the battler for constabulary honors in a wharf-rat precinct of the East Side. No better evidence of this ultra spirit of strife can be had than the admission of the publisher of the *Chronicle*, found in the record in this case, as to how he hated Taft, the head of the ticket which he now says he supported. It is impossible that the campaign should have been otherwise. The head of the Reform ticket—pre-eminently one of Homer's leaders of men—had, above all things, what John Randolph used to call "a talent for turbulence." And he is one of that kind of persons who manage to embroil pretty much everybody in his contagious quarrelsomeness. As between Republicans and the so-called Reformers, no one of either could keep out of the internecine fight of last year, nor could one dodge taking sides; Mr. John Dawkins, if he had been alive again, simply would not have been in it.

And yet, the publisher of the *Chronicle* maintains in this record and at the bar, that he did this impossible thing.

What he says is that, finding the good old republican ship in the hands of pirates, with William H. Taft as the Jolly Roger, to avoid seeing his party walk the plank he concluded to lend a hand at scuttling the craft. Accordingly, he denounced the regular nominee of the party to which he now says he then owed political allegiance. He counseled the readers of his paper to put a cross-mark over the state and national ticket of the party to which he now claims he was then "opposite." It is true, as he says, that he advised also a cross at the head of the Republican county ticket, but when he adds that there was no Reform county ticket in the field, the merit of his advice in this respect, considered from a partisan point of view, becomes elusive. The explanation that a part of this advocacy of candidates was paid for does not improve the matter at the bar of political morals, nor does it change the requirements of the statute. At best, it only undertakes to shift the transaction from the category of political treason to that of party prostitution; the subject was either in the enemy's camp or "on the street"—a political *nymph du pave*.

It is true that on the trial it is denied that the platform—which is only the form of declared principles—of the party which the *Chronicle* now professes loyally to have served last year, was in any way assailed last year. We shall let the record speak on this point. In an editorial article published in the *Chronicle* of August 9th, 1912, the following language appeared:

"It is apparent that the Republican party is no longer Republican in the sense that it stands as the representative party of the people-at-large. Since Taft and the representatives of special privilege have committed the theft of the Republican party, there is no longer any hope for the common people from that source.

"Roosevelt and the Progressive party, by their confession of faith and their party platform offer the relief that the masses demand. The platform is clear, progressive and does not waver nor evade the issues of the present day. The declarations stand out clear and ring with true patriotism. If the progressive party should win at the election the country will be safe in Mr. Roosevelt's hands."

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It is true that in the same article something is said commendatory of Mr. Candidate Wilson, also. But neither Mr. Wilson nor his party is in this case, and neither need be mentioned here; the fight is between Mr. Taft's party and the party of Mr. Roosevelt, and in that fight the *Chronicle* says it was for the former,—that is, it claims to have been of "opposite politics" to the latter. If this is so,—if the *Chronicle* was indeed Mr. Roosevelt's friend—and he surely *was*, in fact he says so,—then if Mr. Roosevelt were the prophet Job in all things—patience included—which he was not, by a long shot—why, then he might with the afflicted man of old have exclaimed: "Behold my desire is * * * that mine adversary had written a book,"—or rather, a newspaper.

This friendly enmity might be pursued a good deal further without travelling outside the record, but the quality of it may be found from the samples already given. Mr. Lincoln said the war could not be fought with squirtguns made out of elder-stalks charged with rose-water, and enemies of the Roosevelt type do not usually assail each other with palm branches.

These being the facts, what was the status, in a party way, of the *Chronicle* in the momentous and highly quarrelsome campaign of 1912? Foraker was once defeated for Governor of Ohio because he maintained that he was "neither for nor against" prohibition in this state. Assuming, as surely we may, from its own confessions in this case, that the *Chronicle* was substantially in Foraker's plight, might it take that position and still claim benefit of clergy—or, rather, of the publication law that we are considering? What is the political status of a "neither for nor against" newspaper, in the eye of the statute in question? Some research here might be employed, usefully, perhaps, but ours can be but brief.

The late Mr. Barnum exploited Joice Heth, the Feejee mermaid, the Woolly Horse, the what-is-it, and other things of doubtful origin and function. We shall not undertake to assimilate any of these to the character assumed by the *Chronicle* last year. Our desire would be to place the *Chronicle*, in respect of the matter now under consideration, where the *Chronicle* has evidently placed itself, and we shall try to leave the *Chronicle* where the *Chronicle* has left itself—if we can find out where that it.

Hermes was the Greek Mercury, and the ancients all agree that he was what Fielding says Mr. Partridge, the schoolmaster, was—"a jolly brisk young man." Aphrodite, as is well known, was the Grecian Venus, and what her qualities were is matter of tolerably common knowledge among men today. Out of the two names the wealthy English tongue has coined another—"Hermaphrodite,"—a name which, outside of politics survives chiefly and usefully in the rig of a craft known as an hermaphrodite brig. It does not signify a sexless being, but quite the reverse. It is bi-sexed,—so highly endowed is it with powers that make for increase of voters. If we go into the realm of sex-poverty—and certainly in these piping times of eugenic reform and all-around uplift we may do so—we shall find a product, sometimes incarnate in newspapers, which is not favored in the estimation of some men of the party to which the *Chronicle* upon the record here says it belongs. We may appeal with some degree of confidence to the words of a Republican of pristine days,—before Taft robbed the party of its ancient virtue,—and we shall expect every true and traditionally loyal member of the party, including the *Chronicle*, to agree and abide. It is the language of a Republican saint now in glory—if there is such a thing. We shall take no liberty with the words used, except such a necessary change of names and dates as shall serve to bring it up to the supreme occasion of 1912. He said:

"Mr. President, the neuter gender is not popular, either in nature or society. 'Male and female created He them.' But there is a third sex, if sex that can be called which sex has none, resulting sometimes from a cruel caprice of nature, at others from accident or malevolent design, possessing the vices of both and the virtues of neither; effeminate without being masculine or feminine; unable either to beget or to bear; possessing neither fecundity nor virility; endowed with the contempt of men and the derision of women, and doomed to sterility, isolation and extinction. But they have two recognized functions. They sing falsetto, and they are usually selected as the guardians of the seraglios of oriental despots. Geology teaches us that in the process of being, upward from the protoplasmic cell, through one form of existence to another, there are intermediary and connecting stages, in which the creature bears some resemblance to the

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state from which it has emerged and some to the state to which he is proceeding. History is stratified politics; every stratum is fossiliferous; and I am inclined to think that the political geologist of the future in his antiquarian researches between the triassic series of 1908 and the cretaceous series of 1912, as he inspects the jurassic Bull-Moose strata intervening, will find some curious illustrations of the doctrine of political evolution.

"In the transition from the fish to the bird there is an anomalous animal, long since extinct, named by the geologist the pterodactyl, or winged reptile, a lizard with feathers upon its paws and plumes upon its tail. A political system which illustrates in its practical operations the choice by the same leader, as twin door-keepers of his party's conscience, of Walter Brown and Jim Garfield, can properly be regarded as in the transition epoch and characterized as the pterodactyl of politics. It is, like that animal, equally adapted to waddling and dabbling in the slime and mud of partisan politics, and soaring aloft with discordant cries into the glittering and opalescent empyrean of reform."

If, on the other hand, we resort to Democratic authority for Wilson, it must be remembered, was commended by the *Chronicle*, and it was urged at the bar in this case as an evidence of impartial political sexlessness last year, we shall run upon what on another occasion a western Milton—"inglorious," to be sure, but alas! by no means "mute"—let loose with, as follows:

"A Democrat fool who serves as a tool
The men of his party to beat,
Deserves to be thrashed and have his head mashed,
And kicked out into the street.

'Tis better to vote for some billy goat,
That butts for his corn and his hay,
Than to vote for a man that has not the sand
To stand by his party a day."

The unhappy condition of the political enuch in this country was more tersely but quite accurately likened by Randolph to that of the mule—"having neither pride of ancestry nor hope of posterity."

Not the least satisfactory evidence that the politically sexless status of the *Chronicle* must have existed in the heroic age of

reform in 1912, and that it and the *Telegram*, its now enemy, according to the attempted contract of the Elyria council, were not of "opposite" but of the same, or substantially the same, politics, last year, we find in the attitude of the *Telegram* at the trial before us. The *Telegram* knew, it was more than once informed from the bench, that its own political standing was not in dispute and that the court was with it in its contention that its contract with the council was not obnoxious to just legal criticism. Nevertheless, the *Telegram* attempted to say a word—yes, several words—to help out its co-defendant, the *Chronicle*, in its assertion of a right to participate in the publishing contract to the exclusion of a real, and not simulated opposition newspaper. When John Alden, as proxy for Miles Standish, went to court Priscilla, the girl asked him why he didn't say something for himself. This concatenation of good offices between two supposedly virulent foes, suggested an excellent mutual understanding as to the hoped-for distributees of the loaves and fishes embodied in the printing contracts. Plainly, the two are not political enemies, but in the substantial matters of practical partisanship are friends, just as in the like matters they were not enemies but friends in 1912,—working to the same ends, through a real community of political interests.

By its own confession in this case, the motives which impelled and shaped the political action and omissions of the *Chronicle* in the campaign of 1912, were in part a vindictive hatred of the head of the ticket to which it now claims it owed fidelity and entire service, and in part the pay it got for its support of state and local candidates. Neither one, nor both together, rose to the dignity of politics in the sense that the statute uses the word. And so far were either or both sets of motives from being "opposite politics," as we have seen already, they were in substance and in fact of the same politics with the only paper to which the council of Elyria has thought fit to let its printing contract,—if indeed it can be said to have had any politics at all—Which we as matter of fact find was not the case.

The *Chronicle*, by its conduct in the campaign of 1912, voluntarily emasculated itself, politically. It, deliberately and of its

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free-will, unsexed itself, politically. It became, of its own accord, not of doubtful gender, but of no gender, politically. It is, we are certain, more charitable as well as more accurate, to take this view of the matter than to fly in the face of the notorious facts and the history of the *Chronicle*, and say that it was in 1912, a Republican newspaper, in full faith and fellowship with the Republican party, its organization, its discipline, its platform and its admitted leaders. And we regard this conclusion as more honorable also to the *Chronicle*, in spite of its desire to hold on to its contract, at a very large expense, we think, to its reputation for consistency and for truth. We can not consent to the view that because matter printed in a newspaper is boiler-plate matter, the publisher is relieved from the responsibility of giving it out to his readers as the opinion of his paper, or that commendatory mention of candidates shall not because paid for be exempt from a like responsibility; to take pay and then dodge the consequences only adds meanness to venality.

We find and hold that the *Telegram* was last year an opposition paper to another paper which is not a party to this action and whose status and fortunes are therefore of no concern to the court. But it was not in opposition to a paper battling manfully on its own side. To be "opposite" implies something to be opposite to. There was nothing in the political conduct of the *Chronicle* to which the *Telegram* could possibly be opposite,—unless, perhaps, it was to the confessedly merchandising support the former gave to local, and even non-partisan judicial, candidates, and on this point the record is silent.

One of two things, under the admitted facts of this case, must be true: In the campaign of 1912 the *Chronicle* either had no "politics," in the sense contemplated by the law we are to enforce here, or its "politics" at that time was of the Roosevelt or Reform brand. In the latter case its politics was "friendly politics." In neither case was it of "opposite politics" to the *Telegram*. "Politics" which in controlling matters is placed at the service of the other side and as to the rest is for sale to candidates for judges and understrappers, with a few crumbs donated to wealthy townsmen and neighbors,—such "politics," we say, is no "politics"; much less it is "opposite politics."

We leave the *Chronicle* in this respect where it has left itself, without any political status to support the contract which the council of Elyria undertook to make with the defendant, its publisher. It has disabled itself from making that contract and will not be allowed to have the benefit of a service which it can not render—that of a newspaper “of opposite politics” to another newspaper which had “politics.”

We shall not accede to the alternative request of the defendant, the *Chronicle* Printing Company, that in the event of our reaching the conclusion we have reached, then we shall declare both contracts void and thus send the matter back to the council for entire action *de novo*. There is no reason in law why this should be done. The two contracts do not fall under the same condemnation. There is admittedly no infirmity in the contract made with the defendant, the Republican Printing Company, and it is entitled to the avails of its bargain.

There is another and in our opinion a cogent reason for this determination. Where a body charged with a plain duty has shown a manifest disposition to ignore its obligation and to defeat the purpose of the law which imposes it, it is right, it is proper, for the courts to be equally astute in beating the game, if they can do so within the rules which control them. We think this can be done in this case by simply declaring void the purported contract between the City of Elyria and the *Chronicle* Publishing Company, without more. This we shall do. There will then be a valid and subsisting contract between the city and one of the two newspapers “of opposite politics” required by the statute. The city council of Elyria can do the rest. We abstain from further suggestion on the subject.

The drift of public opinion in this country now is towards more non-partisanship in politics. The tendency is wholesome,—unquestionably. At any rate, the new policy has got to have its fling.

But it will not long remain so if we abandon the discipline and a certain sense of honor hitherto exerted by party organizations, and replace these with a lot of journalistic janizaries, who, confessedly having no principle, are to charge a high rate of interest on the vacuum thus capitalized into a mercantile asset.

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And an abdication of this power to the press,—which should be as Caesar's wife,—without all the checks and safeguards of a jealous sense of public propriety, would be full of peril. It is a question whether it was not a newspaper office instead of the Temple, out of which the Master with a scourge chased the money-changers and the merchandisers.

On the other hand, there is a danger that—riding on the crest of the uplift wave—the best-intentioned reforms in the world may suffer from falling into the hands of irresponsible champions in the shape of visionaries and impracticables.

Full many a whim of purest ray serene,
The dark, unfathomed brains of uplift bear;
Full many a wheel was formed to whirr unseen
And waste its fleetness 'neath the Bull Moose hair.

The defendant, the city of Elyria, will be perpetually enjoined from proceeding further under its alleged contract with its co-defendants, the Chronicle Publishing Company. A decree may be drawn accordingly.

RIGHTS UNDER AN EXPIRED GAS FRANCHISE.

Court of Appeals for Tuscarawas County.

VILLAGE OF NEWCOMERSTOWN V. THE CONSOLIDATED GAS COMPANY and H. B. WALKER & COMPANY.*

Decided, February 6, 1919.

Gas Company—May Not be Compelled to Continue Service—Under a New Franchise which it has not Accepted—Second Ordinance Does Not Repeal a Former One by Implication—Injunction.

1. A franchise, whereunder a gas company furnished gas to a village and its inhabitants for a specified number of years, becomes at the expiration of the term named an indeterminate franchise, under which the company is not bound to continue to supply gas, but if it

*Affirmed by the Supreme Court, May 13, 1919.

elects so to do the rate charged must be the same as during the period in which the franchise was in force.

2. The adoption by the village of a second or third ordinance, granting a renewal of the first ordinance but on different terms, does not repeal the first ordinance by implication and does not become binding upon the company until accepted by it.
3. It follows that where the gas company has not accepted the terms provided in the second franchise, it is at liberty to terminate its connection with the village at any time it sees fit to remove its property therefrom, and an action does not lie to enjoin the discontinuance or an impairment of the service.

POWELL, J.

This action is in this court by appeal from the judgment of the court of common pleas of this county. The plaintiff is the village of Newcomerstown, Ohio, a municipal corporation, and the defendant, The Consolidated Gas Company, is a corporation which has been and now is furnishing gas to consumers in that village. It is alleged that the defendant, Walker & Company, have some interest in the property of the other defendant, the gas company.

Plaintiff seeks by this action to enjoin the defendant gas company from discontinuing or in any way impairing its service of gas to the said village and the inhabitants thereof. The gas company claims the right to discontinue its service to said village and to withdraw and remove its property therefrom. The legal rights of the parties, so far as this case is concerned, and their relations to each other are fixed and determined by four separate ordinances passed by the council of said village. The first of said ordinances was passed August 15, 1904, and granted to The Consolidated Gas Company the right or franchise to use the streets of said village in the operation of its gas plant. No question is made as to the legal effect of its terms or as to the service rendered by the defendant gas company under its provisions and terms. This ordinance was accepted in writing by the plaintiff. It is admitted that under the provisions of this ordinance the defendant gas company installed its plant in the village and performed the service required of it by said ordinance until the termination of the time

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fixed by it for service, at the specified rate provided by such ordinance, namely, ten years. It is claimed on the part of the gas company that it continues in the streets of said village, and renders the service that it has rendered to the present time, under the provisions of this ordinance.

The second ordinance was passed by the council of said village in April, 1905, and provided a modification for some of the provisions in the first ordinance mentioned. It also extended the term for which service might be rendered under the rate fixed to ten years after the passage of said second ordinance. This was also accepted in writing by said plaintiff. No question is made that the gas company performed the conditions and carried out the terms imposed by said second ordinance in said village. The ten year period, for which rates were fixed, expired in April, 1915, and the defendant gas company continued in the operation of its gas plant in furnishing gas to said village and other consumers, under said ordinance, until a new ordinance was passed in October, 1915. This ordinance was passed by the council of said village on the 4th of October, 1915, but the same was never accepted in writing by the defendant gas company; and it is contended on the part of the plaintiff that, by the conduct of the gas company relative to said ordinance, an implied contract arises thereunder in favor of the village, by which the gas company was bound to continue to furnish gas to said village and residents thereof on the terms proposed in said third ordinance, while it is contended on the part of the defendant gas company that said ordinance is without any legal effect; that its terms and provisions were never accepted by it, and no contract arose by reason thereof between it and the said village.

The fourth ordinance mentioned was passed by the council of the village of Newcomerstown in August, 1918. There is no contention but that the gas company entered the village of Newcomerstown under the terms and provisions of the ordinance of August, 1904, and continued under the second ordinance passed in April, 1905, as modified, until the end of the ten year period, for which rates had been fixed. It is contended

on the part of the gas company that its tenure continued under said ordinances after the ten year period for which rates were fixed, had expired, and that it had never consented or agreed to the terms and conditions of any other ordinance passed by the council of said village and that, so far as its legal rights in said village were concerned, it is governed by the provisions of said two ordinances only.

The court is of opinion that this contention is well taken; that the franchise granted by the first ordinance mentioned is not limited as to time but is indeterminate in duration and constitutes an express contract when accepted, for ten years, the rate or price of gas having been fixed and agreed to for that period; that the ordinance passed in October, 1915, was only in the nature of a proposal to a contract yet to be made, which would necessarily have to be accepted by the party to whom the proposal was made, in order to constitute a valid and binding contract. This acceptance never took place either actually or by implication. The record discloses that the officers of the gas company appeared before the council in session and notified them that the terms and conditions of such ordinance would not be accepted by said company, and it is admitted that they were never accepted in writing by the gas company. Said village, however, contends that the ordinances of 1904 and 1905, were repealed by implication, by the ordinance of October, 1915. It is a universal rule that repeals by implication are not favored, and only occur in case of direct conflict, or repugnancy, existing between two ordinances or statutes, in which case the first ordinance is repealed to the extent of such conflict or repugnancy. No such conflict or repugnancy is found in the ordinance mentioned.

The gas company, however, filed a schedule of rates, as required by the Public Utilities act, with the Public Utilities Commission, and service was continued by it at the new rate without reference to any of the terms, conditions or provisions of said ordinance of October, 1915, and the company continued to operate under this arrangement until the fourth ordinance was passed in August, 1918. This ordinance was not intended

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to establish a contract between the village and the gas company, but simply provided a regulation on the part of the village by which any person might supply gas to said village or to the inhabitants or other consumers thereof, at the rate of 47c per thousand cubic feet, which was largely in excess of any rate that had before that time been in use in said village. After this ordinance was passed, the gas company again filed a schedule of rates, fixing the same rate that the ordinance had fixed, at which it would supply gas to said village and such others as might desire its use.

It is contended on the part of the village that the ordinance of October, 1915, repealed the ordinances of 1904 and 1905, and that by reason of the continuance of the gas company in supplying gas to said village, it in effect or by implication adopted the ordinance of 1915, and that it thereby became and is now the basis of the legal rights of the parties to this action.

The majority of the court is of opinion that the village could not enter into a contract by implication under the circumstances shown by this record; that the gas company's entry into said village was under the ordinances of 1904 and 1905; that no direct repeal of said ordinances has ever been made; that the franchise granted by said ordinances of 1904 and 1905, became, after the expiration of the ten year period, a contract at will, that might be terminated by either party to the contract at any time that such party saw fit to withdraw therefrom; and that such rights as the gas company has in the streets of said village and under said contract are referable solely to the ordinances of 1904 and 1905.

It is further contended on the part of plaintiff that the action of the gas company in filing its schedule of rates after the passage of the last two ordinances named, constituted an acceptance of the terms of said ordinances on the part of said gas company, under the provisions of Section 614-44, which provides that the filing of a complaint by a public utility under the provisions of said Section 614-44 would constitute in effect an acceptance of the terms of said ordinances; that by reason of having filed a schedule of rates after the passage of the third

and fourth ordinances mentioned, it would be bound by their terms for the period, at least, provided by said ordinances.

The court is of opinion that the filing of the schedule of rates under said two ordinances was not in the nature of a complaint, as contemplated by said Section 614-44, but was rather the filing of a rate as provided by other sections of said Public Utilities act, and that it did not, in the circumstances, constitute an acceptance of the terms and conditions of said ordinances of October, 1915, and August, 1918; but that the gas company, from the time it entered said village until the commencement of this action, was there solely under the terms and conditions of the ordinances of 1904 and 1905; and that, as held in the 81 O. S., 33, it became and was an indeterminate franchise after April, 1915, when the ten year period, during which rates were fixed by said two ordinances, was terminated.

We are of opinion that on the record shown in this case the defendant gas company has the right to terminate its connection with said village and remove its property therefrom at any time it may see fit to do so; that it is bound, however, while it remains in said village, to supply gas according to the terms of the original contract or by the terms and conditions of the ordinances of 1904 and 1905.

It follows from this finding that the plaintiff is without legal standing in this court and is not entitled to the relief prayed for in its petition.

It further follows that the petition should be dismissed at the costs of the said plaintiff and such order may be entered.

HOUCK, J., concurs; SHIELDS, J., dissents.

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DUTIES OF A DISTRICT ASSESSOR.

Court of Appeals for Hamilton County.

CRANE, EXR., v. MCCARTHY ET AL.

Decided, February 26, 1917.

Taxation—Duties of District Assessors—Authority to Correct Erroneous Tax Return—Appeal from Valuations as Made by District Assessor—Construction of Warnes Law.

1. Under the act known as the Warnes law (103 O. L., 786) it is the duty of the district assessor to list and value for taxation all personal property subject to taxation in the county constituting his assessment district, and if he finds any statement or return to be erroneous either in the amount of property listed or in the valuation of any item or items to correct such statement or return.
2. Under the Warnes law no particular method is pointed out as to how the district assessor arrives at the amount of the property or its value, and no provision is made as to taking evidence by the district assessor in regard thereto, or as to making any record of such evidence. He acts as an assessing officer, and if he assesses property that is not owned by the person against whom it is listed, or if the valuation made by the assessor is in excess of its true value, relief is provided by an appeal to the board of complaints, and from that board to the state tax commission, and an appeal can ultimately be had to the courts.

Wm. F. Fox, for plaintiff.

J. V. Campbell, prosecuting attorney, contra.

JONES, P. J.

Plaintiff as the executor of the estate of William J. Grew seeks to enjoin the collection of taxes on the personal property of said estate as listed on the 1914 tax duplicate of Hamilton county by the district assessors. It is admitted that Mr. Grew, who died August 30, 1914, was a resident of Cincinnati, and had made no return of his personal property for taxation for the year 1914, although he had at the time of his death personal property as detailed in an inventory filed by his executor

in the probate court, a copy of which was certified to the district assessors.

After notice to the executor, and conferences with his attorney, the district assessors on January 22, 1915, placed upon the tax list for the year 1914, in the name of said executor, as the value of the personal property of said estate subject to taxation, the amount of \$44,250.

Plaintiff claims this action was illegal and void on two grounds:

1. Because the district assessors acted without any evidence.
2. That they failed to comply with Section 5401, General Code, and file a statement of the facts or evidence upon which such correction was made.

The petition contains an allegation that said W. J. Grew had no such an amount of personal property subject to taxation on February 1, 1914. The proofs show that 150 shares of United States Steel common stock was acquired by Mr. Grew February 14, 1914, and therefore was not owned by him on tax-listing day; but no evidence was produced to show that he was not the owner of any other part of his said personalty covered by the inventory. It did appear, however, that he was not in active business, having been retired about three years, and spending his time in travel and in efforts to improve his failing health. One of the district assessors of taxes testified that he was personally acquainted with Mr. Grew and knew him as a man of reputed means; but that he was largely guided by the list of property shown in the inventory in the action of the assessors in making this correction in the tax list.

Under Sections 4 and 9 of the act known as the Warnes law, 103 O. L., 787, 789 (Sections 5582 and 5587, General Code), it is the duty of the district assessor to list and value for taxation all personal property subject to taxation in the county constituting his assessment district, and if he finds any statement or return to be erroneous either in the amount of property listed or in the valuation of any item or items to correct such statement or return.

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Under this law it was undoubtedly the duty of the district assessors of Hamilton county to list the property of the estate of William J. Grew for taxation. No particular method is pointed out in the statute as to how the district assessor arrives at the amount of the property or its value, and no provision is made as to taking evidence by the district assessor in regard thereto, or as to making any record of such evidence. He acts as an assessing officer, and if he assesses property that is not owned by the person against whom it is listed, or if the valuation made by the assessor is in excess of its true value, relief is provided by an appeal to the board of complaints, and from that board to the state tax commission, and an appeal can ultimately be had to the courts, under Section 12075, General Code. No appeal to the board of complaints was made or attempted in this case, for the reason, as stated, that it was not in session at or after the time of the correction complained of.

Counsel for plaintiff assumes that the action of the district assessors was taken under authority of Section 5 of the Warnes Law (Section 5583, General Code), such district assessors acting as the county auditor acted under the terms of Section 5401, General Code, which requires the filing of a statement of facts and evidence on which the correction is made. It is a serious question whether, notwithstanding the terms of the law, an appointed officer such as a district assessor could assume and take over the duties of an elected county official such as the county auditor. If, however, it is conceded that the district assessors could act as the county auditor did, they would act under the terms of Section 5399 rather than 5401, as the first-named section applies strictly to omitted property, while the latter applies to corrections where a return has actually been made. In this case no return was made.

The case relied upon by plaintiff *Fratz v. Mueller*, 35 Ohio St., 397, and *Ratterman, Treas., v. Niehaus & Klinkham*, 4 C. C., 502, do not therefore apply. Both of these cases relate to the action of a board of equalization whose functions were somewhat the same as those provided for a board of complaints in the act under consideration.

Evidence was also introduced in this case showing that the same property had been listed for taxation by the county auditor for the years 1911, 1912 and 1913, and that taxes upon it had been paid for those years. These facts taken in connection with the fact that there is no evidence to show that the district assessors acted without authority in making this charge upon the tax list, except so far as the U. S. Steel stock was concerned, require the court to find against the plaintiff as to the other property.

A decree may be taken enjoining the collection of so much of the tax as relates to the United States Steel stock, which will require a reduction of \$7,500 from the total valuation listed and the corresponding reduction in the tax charge, and refusing further relief.

Judgment accordingly.

GORMAN and HAMILTON, JJ., concur.

CONCLUSIVENESS OF A FORMER JUDGMENT.

Court of Appeals for Licking County.

ELI HULL v. HENRY O. NORRIS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JEROME BUCKINGHAM, DECEASED, ET AL.*

Decided, April 1, 1918.

Application of Doctrine of Res Adjudicata—Statute of Limitations Having Been Held to Have Run the Litigation Can Not be Renewed on the Same Ancient Paper on the New Claim of a Continuing and Subsisting Trust.

When a matter has been finally determined by a competent tribunal in an action on the same claim and between the same parties, the judgment becomes conclusive and is a bar to the litigation of new questions which might have been presented in the first instance.

*Motion to certify the record in this case overruled by the Supreme Court, October 8, 1918.

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McDonald & Slabaugh, Kibler & Kibler, attorneys for plaintiff.
Jones & Jones, Carl Norpell and A. T. Seymour, contra.

HOUCK, J.

This case is in this court on appeal from the common pleas court of Licking county, Ohio.

The pleadings are quite lengthy, and present a number of questions of fact and law for determination, but counsel in oral argument agreed that the case be submitted upon two questions only, namely:

First, upon the claim relied upon by plaintiff, that the paper writing in question and the allegations of the petition state a cause of action upon a continuing and subsisting trust:

Second, that the defendants deny the claim of plaintiff, and as affirmative defenses say that the cause of action of plaintiff, if he ever had one, is barred by the statute of limitations; and they further plead *res adjudicata*.

We have given the case careful consideration, and have been interested in reading the pleadings, the testimony as contained in the typewritten transcript, and in examining the able briefs submitted by learned counsel.

The questions before us are new and somewhat novel when applied to the writing in question and the peculiar facts involved in this controversy.

The basis of the action is the following paper writing:

"Received of Eli Hull, Esq., on the 7th day of August, A. D. 1873, three thousand dollars, to be returned to him, with interest from that date at the rate of twelve per cent. per annum out of the first receipts from sale of lands bought by us from Messrs. Coe, Pherson and others, in Athens county, Ohio, after we are reimbursed for advances in its payment.

\$3000.

(signed) BUCKINGHAM & WRIGHT."

The following endorsement appears upon the back of said paper writing:

"One thousand dollars of the within three thousand dollars I owe to James L. Birkley for that sum belonging to him.
Sept. 5, 1873. (Signed) ELI HULL."

The plaintiff here on June 14th, 1904, brought suit in the common pleas court of Licking county against the same parties as in this case, founded upon the same paper writing. The suit finally reached the Supreme Court, where judgment was rendered against said Eli Hull. (See 83 O. S., page 385.) As we construe this paper writing, being the foundation upon which plaintiff seeks to recover, and the allegations of fact as set forth in the petition relative to same, we must and do find that they are not sufficient in fact and law to constitute a cause of action based upon a continuing and subsisting trust. We therefore find that the plaintiff's claim in this regard is not well taken.

We are next led to inquire as to the force and effect in law of the alleged defenses of the defendants. We are fully convinced that the judgment in the case of *Wright et al v. Hull, supra*, is decisive of all the issues raised in the present action. In that case, at page 399, Judge Davis, speaking for the court says:

"We therefore are warranted in holding that this paper writing purports to be an agreement to pay within a reasonable time. It has no date, but from what appears on its face and in the indorsement on the back thereof, its date may be assumed to be some time prior to September 5, 1873; and in the absence of any evidence of rebutting circumstances, we may safely say that ten years, and even less, was a reasonable time within which the obligors should pay this claim of three thousand dollars and interest. Hence, the statute of limitations, as well as the presumption of payment in twenty years, would begin to run ten years from the time of the execution of the instrument. That is to say, that this paper, the foundation of the plaintiff's action, would be actually barred by the statute of limitations in twenty-five years from its execution, and the presumption of payment at common law and in equity would be complete in thirty years from its execution, unless it be shown by evidence that a reasonable time for payment would be much longer than we have fixed it."

We hold that the plaintiff has already had his day in court as to all of the issues raised or that might have been raised in the instant case, and if he neglected and failed to present them in his

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former suit growing out of the same subject matter as in this case, it is now too late for him to complain. The rule of law in Ohio is well settled that when a matter has been finally determined in an action between the same parties, by a competent tribunal, the judgment is conclusive, not only as to what was determined but also as to further questions which might properly have been litigated in the case.

We do not deem it necessary to discuss the facts or law in this case at further length, and it necessarily follows from what we have already said that we are of the opinion that the plaintiff is not entitled to the relief prayed for in his petition, and judgment is here entered for the defendants, and the plaintiff's petition is dismissed, at his costs.

POWELL, J., and SHIELDS, J., concur.

**SEPARATION OF HUSBAND AND WIFE WHICH DOES NOT
CONSTITUTE WILFUL ABSENCE.**

Court of Appeals for Hamilton County.

CONDON V. CONDON.

Decided, May 7, 1917.

Divorce and Alimony—Separation Which is Justified Does Not Constitute Ground for Divorce—Dismissal of Suit Without Full Hearing Subject to Review.

1. A judgment of dismissal of an action for divorce without a full hearing is subject to review.
2. No divorce can be had for wilful absence or separation where the separation on the part of the accused person is justified, and a wife is justified in living apart from her husband where she has established a right to do so by obtaining a decree for separate support and maintenance.
3. As long as a wife is living apart from her husband and receiving alimony from him as awarded by a decree of court of competent jurisdiction, finding the husband guilty of wilful abandonment and

desertion which decree is unreversed and unmodified, the wife can not be said to be wilfully absent from her husband as she is acting in accordance with her rights under the decree.

Heard on error.

Hulswitt & Lillie for plaintiff in error.

Dempsey & Nieberding, contra.

GORMAN, J.

In the court of common pleas, division of domestic relations, the plaintiff, Maurice M. Condon, brought an action against the defendant, Margaret M. Condon, for divorce, alleging as a ground therefor that the defendant had been guilty of wilful absence for more than three years; that she had been guilty of gross neglect of duty in that she failed to perform the duties of a wife in preparing his meals and keeping his residence in a cleanly and habitable condition; and that she constantly nagged and found fault with him, and obstructed and hindered him in his business.

To this petition the defendant filed an answer admitting the marriage, that plaintiff is a *bona fide* resident of Hamilton county, Ohio, and that there were no children born of the marriage. But she denied that she was guilty of gross neglect of duty towards the plaintiff, and denied that she had been wilfully absent as alleged in the petition. For a second defense against the charge of gross neglect of duty set out in the petition the defendant averred that in a certain action for alimony brought by her in the insolvency court of Hamilton county, Ohio, numbered 3075 on the docket, the plaintiff filed his cross-petition against her charging her with the same gross neglect of duty that he charges in the petition in this case, and praying to be divorced from defendant on account thereof. She further set out that she filed her answer to said cross-petition in said case in the insolvency court, denying said charge of gross neglect, and praying on her own behalf that the cross-petition be dismissed; that upon the issues so made by said cross-petition and answer a hearing was had in said insolvency court, and upon said hearing upon the 13th day of April,

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1911, the said insolvency court did enter its final judgment and decree in said cause, finding among other things, upon the issues joined upon said charge of gross neglect of duty, in favor of this defendant, and that she was not guilty thereof as charged by plaintiff, and ordering and adjudging that said cross-petition for divorce in said cause in said insolvency court be dismissed. The defendant further averred that said case No. 3075 in said court is *res adjudicata* as to the charges of gross neglect of duty made by plaintiff in this case, and that said plaintiff is estopped and barred by said final judgment and decree from relitigating said charges in this case. For a third defense to the charge of wilful absence the defendant set out that the plaintiff wilfully abandoned and deserted her and left her penniless and in great financial straits on the 9th day of August, 1910; and further averred that the insolvency court of Hamilton county in its final judgment and decree, referred to in the second defense herein, found as a fact that plaintiff did on August 9, 1910, wilfully abandon and desert defendant, and as a consequence thereof did order, adjudge and decree that plaintiff should pay this defendant, as and for alimony, during the continuance of the judgment and decree, the sum of fifteen dollars per week on Monday of each and every week; that since the rendition of said judgment, and, as defendant believes, for the purpose of evading payment of the same, the plaintiff has twice through intermediaries and not in his own proper person requested the defendant to return to him and to resume marital life with him; and that the defendant declined and refused, and still declines and refuses, for the reasons, first, that the plaintiff is now and has been for a long time prior to the date of the separation a continual and habitual drunkard; second, that the plaintiff is now and was at the time of their said separation and has ever since been consorting with another woman to the great scandal and disrespect of this defendant. And for a fourth defense, the defendant alleged that the plaintiff did not bring this action in good faith, but for the purpose of getting rid of the judgment of alimony awarded against him by said insolvency court; that the judg-

ment of the insolvency court awarding her fifteen dollars was made a lien upon the real estate of plaintiff, which is set out and described by him in the petition, and that after said judgment was rendered the plaintiff herein appealed to the Circuit Court of Hamilton County from the judgment entered by the insolvency court in her favor for alimony of fifteen dollars per week, and on appeal in said court, cause No. 5387, on November 26, 1913, said Circuit Court of Hamilton County entered as its judgment and decree the same judgment and decree entered by the insolvency court and also made an allowance of fifteen dollars per week alimony a lien and charge upon plaintiff's real estate. The defendant further set out in her answer that the said judgments and decrees of the Insolvency Court of Hamilton County and the Circuit Court of Hamilton County are in full force and effect, unreversed and unmodified. Defendant therefore prays that plaintiff's petition for divorce be dismissed and that she may be protected in all her rights.

To this answer the plaintiff filed a reply in which he denies that he is estopped or barred from setting up in the petition the allegation of gross neglect of duty, and he denies that he does not bring this action in good faith, and he denies that there was any mercenary motive in his attempts to effect a reconciliation, denies that he is a continual and habitual drunkard, denies that he has been consorting with another woman, denies that he has threatened defendant with personal violence and that she is in mortal fear of him, asserting that the claim that she is in mortal fear of him is a fabrication stated only for the purpose of eliciting sympathy. He denies that he at any time refused to provide suitable apartments for himself and defendant, such as those that ought to be provided by a man of his means.

It will be noticed that the reply fails to deny the decrees entered in the insolvency and the circuit courts of Hamilton county, and fails to deny that the decrees were found against him upon the issue of gross neglect of duty and abandonment.

Upon the trial of this case in the common pleas court before his honor Charles W. Hoffman, judge of the division of do-

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mestic relations, the defendant offered in evidence the pleadings in the former alimony and divorce case in the Insolvency Court of Hamilton County, and also the decree entered by that court in said cause, and the decree entered by the Circuit Court of Hamilton County when said cause was appealed to that court. The court of common pleas refused to hear any further testimony with regard to the charge of gross neglect of duty or wilful absence, as set up in the petition, and claimed to have occurred since the entry of said judgments of the Insolvency Court and the Circuit Court of Hamilton County. The court further adjudged and decreed that the petition of plaintiff herein be dismissed and that the defendant Margaret M. Condon recover from the plaintiff her costs and counsel fees. To all of the foregoing rulings of the court, the judgment, and order and decree, the plaintiff Maurice M. Condon excepted, and is in this court asking for a reversal of the judgment dismissing his petition.

At the outset of the case it is claimed that there is no bill of exceptions filed in this case. It appears from the record that the judgment entry was made by the court of domestic relations on August 11, 1916, and a bill of exceptions was duly filed in the court of common pleas on September 20, 1916, and transmitted by the clerk of that court to Judge Hoffman on October 2, 1916. Judge Hoffman, on the same day, October 2, 1916, returned the bill to the clerk of the court of common pleas with his acknowledgment of the receipt thereof and his signature.

The petition in error together with a transcript of the docket and journal entries of the court of common pleas and the original pleadings were filed in this court on October 16, 1916, but no bill of exceptions appears to have been filed on that date. A bill of exceptions duly signed by Judge Hoffman, and purporting to contain all the evidence offered below, was filed in this court on November 24, 1916, one hundred and five days after the judgment was rendered in the common pleas court. The petition in error in this court was filed October 16, 1916, within the seventy-day period fixed by the statute for the filing

of a petition in error, but the requirements of the statute that the bill of exceptions shall be filed with the petition in error within the statutory time of seventy days was not complied with. As an excuse for this, counsel for plaintiff in error claims that he left the bill of exceptions with the clerk of the court and that by inadvertence or oversight the clerk of the court neglected to file it in the court of appeals on October 16, 1916, when the transcript, the petition in error and the original papers were filed. The bill of exceptions was found in the safe of the clerk on or about November 24, 1916, the date of the filing in this court. The deputy clerk who attends to the filing of papers in the court of appeals had no independent recollection of a bill of exceptions being presented to him, but counsel for plaintiff in error claims that he did present it to this clerk for filing. Under these circumstances we are not prepared to say that counsel for plaintiff in error did not perform his full duty in presenting the bill of exceptions to be filed, with the proper deputy clerk, and the failure of the clerk to file the bill of exceptions could not be charged to plaintiff in error or his counsel. We are disposed to give the plaintiff in error the benefit of the doubt and hold that under the circumstances the bill of exceptions should be considered by this court.

But, considering the bill of exceptions and all the evidence adduced, together with the rulings of the court in failing to hear other evidence, we are of the opinion that the court of common pleas did not err in dismissing the petition of plaintiff.

Ordinarily a judgment of the court of common pleas in a divorce matter is not reviewable by this court, on the grounds of public policy. It may be claimed under Section 12002, General Code, that where the court of common pleas dismisses the petition without a final hearing, error may be prosecuted to this court. That section provides:

“No appeal shall be allowed from a judgment or order of the common pleas court under this chapter (the chapter relating to divorce and alimony) except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony.”

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This is not an appeal proceeding, and, furthermore, under the new constitution, as adopted in 1912, there is no longer any appeal from a judgment of divorce or alimony to the court of appeals. But, in view of the fact that this section remains unrepealed, we think, as has been said by this court in the *Schmid* case decided today, by analogy it appears to be the policy of the legislature to allow a review of a divorce case when there is a judgment of dismissal without a hearing. It appears to us that this judgment of dismissal of the action without a full hearing is subject to review. But so long as the decree of alimony in the former case, in favor of the defendant in error against the plaintiff in error, which was entered by the Circuit Court of Hamilton County in 1913, remains in full force, unreversed and unmodified, the plaintiff in error in this case is bound by all the findings set out in that decree touching the matter of gross neglect of duty and abandonment. In the decree the circuit court did find that the plaintiff in error had abandoned the defendant in error and that she was not guilty of any neglect of duty toward plaintiff in error, and awarded her alimony of fifteen dollars per week. The plaintiff in error in the petition below set out no new cause of action, and as long as defendant in error in this case is living apart from plaintiff in error and receiving alimony from him as awarded by the circuit court of Hamilton county in the former case, she can not be said to be wilfully absent from the plaintiff, as she is acting in accordance with her rights under the decree of the circuit court.

These questions in fact, having been determined against the plaintiff in error, can not be reopened and relitigated in a subsequent action between the same parties. We think this doctrine is fully supported by the following authorities: *Miller v. Miller*, 150 Mass., 111; *Harrington v. Harrington*, 189 Mass., 281; *Weld v. Weld*, 27 Minn., 330, and *I Nelson on Divorce and Separation*, Section 92.

The author of the last-named authority says in the section cited that no divorce can be had for wilful absence or separation where the separation on the part of the accused persons is justified, and that a wife is justified in living apart from her husband

where she has established a right to do so by obtaining a decree for separate support and maintenance.

If the plaintiff in error in this case has any new grounds for divorce against his wife, which have arisen since the rendition of the judgment in the circuit court, or if the decree of the circuit court of Hamilton county had been set aside or modified, he would have a right to maintain an action for divorce against the defendant in error. But so long as the status of the parties remains as it has been fixed by the decree entered by the circuit court of Hamilton county, and so long as that judgment continues unreversed and unmodified, we hold the plaintiff in error can not maintain an action for divorce on the ground of wilful absence against the defendant in error.

For the reasons stated, the judgment of the common pleas court will be affirmed.

Judgment affirmed.

JONES, P. J., and HAMILTON, J., concur.

THE OLD SUB-DISTRICT SCHOOL NO LONGER EXISTENT.

Court of Appeals for Tuscarawas County.

JOSEPH PATTON ET AL, MEMBERS OF THE BOARD OF EDUCATION
OF DOVER TOWNSHIP ET AL, V. STATE OF OHIO
EX REL FREDERICK E. HERSHEY ET AL.

Decided, June 11, 1919.

Schools—Sub-districts no Longer Recognized by the Ohio Code—Transportation of Pupils in a Suspended District.

1. Under the present school code of Ohio there is no provision for what were known in the past as sub-districts, and the sub-district school is, therefore, now without authority or legal existence.
2. Provisions must be made for the transportation of all pupils of legal school age who reside in the territory of a suspended school and live more than two miles by the nearest traveled highway from the nearest school or the school to which they have been assigned.

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Tuscarawas County.

E. E. Lindsay, Prosecuting Attorney, and *Ed. C. Seikel*, for the plaintiffs.

C. L. Cronebaugh, contra.

HOUCK, J.

The defendants in error were the relators in the court below. Two questions are presented by the record in this case—

First: Does the present school code of Ohio authorize or does what was formerly known as the "sub-district school" have any legal existence? We answer this in the negative. Section 4579, General Code, reads:

"The school districts of the state shall be styled, respectively, city school districts, village school districts, rural school districts and county school districts."

It was undoubtedly the purpose of the General Assembly of Ohio, by the adoption of this section, to clearly and definitely designate the names of the school districts that could have a legal existence; and the language it used is clear and certain of meaning and no doubt, it seems to us, can possibly exist that the four school districts named in the above section are the only ones that are authorized by law. Sub-districts not being provided for, in said enactment, do not now exist in fact nor in law.

Some of us may and many of us do cherish the sweet memories of the old "sub-district schools," but now they are only with us as we look backward, having been consigned by the law makers of our state into the archives of the past.

Second: When the board of education of a rural school district suspends a school therein, what children of school age residing in the territory of the suspended district shall be transported to another school?

This question must be answered from a correct and proper interpretation placed upon Sections 7730 and 7731, General Code of Ohio. And in doing so we hold that these two sections must be read, interpreted and construed together.

Section 7730, G. C.:

"* * * Upon such suspension the board * * * in such rural school districts shall provide for the conveyance of all pupils

of legal school age, who reside in the territory of the suspended district, to a public school in the rural * * * district."

Section 7731, G. C.:

"In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils shall be optional with the board of education."

We hold that all pupils of legal school age, who reside in the territory of the suspended school, and who live more than two miles from the nearest school must and shall be transported to such nearest school or the school to which they have been assigned, if the same be more than two miles from where such pupil or pupils live in said rural school district. The said distance to be measured from the school house to where such pupils live over the nearest traveled public highway.

It thus follows from what we have already said that the injunction allowed by the common pleas court must be dissolved; that said judgment below should be further modified as indicated by the findings herein, and that the judgment of the common pleas court be and the same is affirmed as modified herein.

Judgment modified and affirmed as modified.

SHIELDS, J., and PATTERSON, J., concur.

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Cuyahoga County.

POWERS OF COUNTY BOARDS OF EDUCATION.

Court of Appeals for Cuyahoga County.

MATHEWS, ETC., v. BOARD OF EDUCATION OF CUYAHOGA
COUNTY ET AL.

Decided, November, 1917.

Schools—Statutory Limitations on the Power of County Boards of Education—Authority to Transfer Property Limited to Such as is Inhabited.

1. A county board of education is a creature of statute, and the exercise of the powers granted to it is limited to those expressly given and those contained by reasonable intendment in the act creating it.
2. A county board of education is not authorized to transfer vacant property, its power in that respect being limited to inhabited property.

William O. Mathews and Ben B. Wickham, for plaintiff.
Samuel Doerfler, Prosecuting Attorney and Locher, Green & Woods, contra.

LIEGHLEY, J.

Appeal from the Court of Appeals for Cuyahoga County.

The parties stood in the same order below.

At one time the territory now included within the village of Bay and within the village of Dover constituted one unit of territory. Thereafter the village of Bay withdrew under proper proceedings, and within its limits was included all of the territory north of the southerly line of the right of way of The New York, Chicago & St Louis Railroad Company, which was the northerly part of what was formerly Dover. The Bay village school district lines were coterminus with the boundaries of Bay village. Assuming to act under authority of Section 4692, General Code, the board of education of Dover district, on November 11, 1916, petitioned the county board of education of Cuyahoga county to detach said railway right of way from Bay district and attach

the same to Dover district. This petition came up for hearing before the county board on December 9, 1916, and action thereon was favorable. Three notices of the proposed transfer were posted in the territory proposed to be transferred, notice thereof published in the *Cleveland Leader*, and a map showing the boundaries of the transferred territory duly filed with the auditor. Within thirty days after the adoption of the resolution granting the prayer of the petition by the county board, the railroad company and a majority of the qualified electors of Bay district filed a written remonstrance to the transfer with the county board.

The plaintiff, as a taxpayer, brought suit against the county board of education, county auditor and county treasurer to restrain the consummation of said transfer, grounding his claim for relief upon illegality of the proceedings, financial injury, and loss to plaintiff and other taxpayers in the village of Bay, by reason of a reduction in the tax duplicate to the extent of the value of said right of way, amounting to about four hundred thousand dollars (\$400,000.00), etc.

The defendants filed an answer, in which is set up the proceedings of the county board substantially as above recited, and in addition thereto the extreme inequality in the burdens borne by the taxpayers in the two districts by reason of the difference in number of schools, pupils and teachers, and the great difference in the taxable value of the property within the territory of each. Defendants admit that the transfer will be consummated unless restrained by the court.

A demurrer was filed by plaintiff to the answer of defendants, which was sustained by the court below, and the defendants stating in open court that they did not desire to plead further the relief prayed for in plaintiff's petition was granted. From this judgment or decree appeal was perfected.

Defendants rely for authority for the proceedings of the county board to transfer said right of way upon Section 4692, General Code. Plaintiff claims that said section should be read with Section 4736, General Code, and that Section 4692 is limited in the purposes for which the county board may transfer territory to those expressed in Section 4736.

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Section 4692 and 4736, as amended in 1915 (106 O. L., 397), read as follows:

"Section 4692. The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

"Section 4736. The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division

of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

Neither of said sections contains an express grant of power to transfer territory for the purpose of adjusting values. It was conceded by counsel in argument that this was the purpose of this transfer. It is an attempt to transfer vacant property in the sense that the property proposed to be transferred is not inhabited. Plaintiff claims there is no authority for this attempt. An examination of the language of said Sections 4692 and 4736 as enacted in 1914 (104 O. L., 135 and 138), of which the above are 1915 amendments, may help us. They read as follows:

"Section 4692. Part of any county school district may be transferred to an adjoining county school district or city or village school districts by the mutual consent of the boards of education having control of such districts. To secure such consent, it shall be necessary for each of the boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred. The passage of such a resolution shall require a majority vote of the full membership of each board by a yea and nay vote, and the vote of each member shall be entered on the records of such boards. Such transfer shall not take effect until a map, showing the boundaries of the territory transferred, is placed upon the records of such boards and copies of the resolution certified to the president and clerk of each board together with a copy of such map are filed with the auditors of the counties in which such transferred territory is situated."

"Section 4736. The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary

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lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of a like nature the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

A comparison of these sections readily reveals material changes in the language employed and the subject-matters covered. A provision in one is omitted, or is transposed to another section with additions and omissions. The following provision contained in Section 4736 of the act of 1914 is entirely omitted in substance and in fact from Section 4736 of the act of 1915, and was not re-enacted in any other section:

"In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation."

It was contended by plaintiff that this provision was originally in the act for the express purpose of giving to county boards the power to make an initial division of districts and adjustments of valuations, but that, when once done, the Legislature intended to deprive county boards of further authority to manipulate tax duplicates. It is claimed by defendants that, notwithstanding the fact that said provision was omitted in the subsequent amendment, the power to make this transfer is included in the general powers granted in Section 4692.

We think some manifest intent and purpose must be conceded to legislative action.

If, as claimed by plaintiff, the omission by the Legislature of this sentence relating to property valuation was deliberate and intentional, with the object in view of ending the powers of the county board in this respect, then, of course, the relief prayed for by the plaintiff should be granted.

The purposes for which transfers may be made by the county board, under authority of Section 4736, General Code, as now in force, are limited to questions of accessibility of pupils and

schools, or *vice versa*. If, as claimed by plaintiff, the general powers conferred in Section 4692 are restricted to the purposes expressed in Section 4736, and that a proper construction of the two acts requires that the same be read together, then we necessarily conclude that the relief prayed for by plaintiff should be awarded to him.

But it is claimed by defendants that the general grant of power contained in the first sentence of Section 4692, as now in force, gives to the county board the right to transfer territory for any purpose that in their discretion and judgment is for the betterment of the schools and to the best interests of the school system. It is claimed that Section 4692 should be read and construed alone. Suppose we do. The first sentence grants power generally. Immediately following it the act provides that said transfer shall not become effective unless three things are done; first, a map of the territory proposed to be transferred shall be prepared and filed with the auditor of the county; second, a notice of said proposed transfer shall be posted in the *district to be transferred*; third, the same shall not be effective if a majority of the qualified electors residing in the *territory to be transferred* shall remonstrate within thirty days after the filing of the map. The transfer shall not be effective unless notice is given and opportunity to remonstrate is afforded. In this case nobody inhabits the right of way. Notice published thereon is notice to no one. Time to remonstrate avails nothing, for no one lives in the territory to file a remonstrance.

It seems to us very clear not only from the language of this section but also from that of Sections 4696 and 4736 that the Legislature in enacting the amendments in 1915 intended to confine the powers of the county board to dealing with persons and pupils, with the sole object in view of the more efficient administration of the schools, and did not intend that the county board should have supervision over property valuations and tax duplicates, or the right to manipulate and readjust the same.

True it is that the railroad company and the majority of the electors of Bay district filed a remonstrance with the county board within the statutory time, but it will be observed that the controlling right to file a remonstrance is limited to the qualifi-

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fied electors residing in the territory *to be transferred*. The electors of Bay do not reside therein, nor is the railroad company an elector. These remonstrances were filed in an apparent effort to comply with Section 4736. These can not hinder the transfer for the evident reason that such are provided for only in case of transfer for the purpose of accessibility of schools. It is admittedly another purpose that pervades this case, authority for which must be found in Section 4692, as likewise the instrument for defeating the same. And this is notice to, and a remonstrance by, the majority of the electors residing in the district *to be transferred*.

The county board of education is a creature of statute, and the exercise of the powers granted to it should be limited to those expressly given and those contained in the act by reasonable intendment. The requirements, by the language of Section 4692, to make a transfer effective, seem to us to make it very certain that the Legislature did not intend that power should reside in the county board to transfer vacant property; nor from the language can it be claimed. It seems clear to us that power is granted only to transfer inhabited property, in which transfer the electors shall have a voice. By the provisions of Section 4696 the electors have a voice by the grant of the right to petition for a transfer. By Section 4736 the electors may file a written remonstrance even in the case where the board makes a transfer for the purpose of accessibility to the schools. We decide that the county board in this case is about to transcend its power and will do so unless restrained.

The defendants are perpetually enjoined as prayed for in the petition.

Judgment is rendered against the defendants for costs.

Injunction granted.

GRANT and CARPENTER, JJ., concur.

WHAT CONSTITUTES A COMPLETE GIFT.

Court of Appeals for Coshocton County.

MCCOY, EXECUTOR, v. GOSSER ET AL.

Decided, July 13, 1917.

Gifts—Requisites to Complete Gift Inter Vivos—Intention of Donor—Delivery—Acceptance by Donee—Burden of Impeaching a Completed Gift.

1. To constitute a gift *inter vivos*, the donor must have the intention of making the gift, and must deliver the thing intended to be given to the donee *in praesenti*, parting with all dominion and control over it. This, to constitute a perfect and complete gift, must be followed by acceptance by the donee of the thing given.
2. If a completed gift be shown, the burden of impeaching it is on him who asserts that there is no gift.

C. B. Hunt, for plaintiff.

W. S. Merrell, George B. Harris and C. A. Neff, for defendant, Fannie N. Burns.

Kibler & Kibler, Frank E. Pomerene and George D. Klein for other defendants.

POWELL, J.

Appeal from the Court of Appeals for Coshocton County.

This action is in this court by appeal, and is submitted on a transcript of the evidence offered in the court of common pleas, supplemented by some additional testimony. It is an action under favor of Section 10857, General Code, brought by C. B. McCoy, as executor of the will of Charles F. Gosser, deceased, asking the direction of the court in the administration of the estate of said decedent. A number of questions are presented by the petition, relative to which plaintiff is in doubt as to his duties. All parties in interest are made parties to the suit, and their respective claims are presented by proper pleadings for that purpose; and while, several questions are raised by the petition, but one is presented to the court by briefs and

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the arguments of counsel. The facts necessary to an understanding of this particular question are as follows:

The decedent, C. F. Gosser, was at the time of his death a director in The Pope-Gosser China Company, a corporation engaged in business in Coshocton, Ohio. Prior to October, 1912, he had become the owner of a majority of its common stock, being 502 shares, represented by some six or seven stock certificates. These certificates had all been endorsed by him in blank, and given to the defendant Fannie N. Burns, in whose possession they were until November, 1912. October 24, 1912, at the request of said C. F. Gosser, three new certificates, aggregating 502 shares, were issued and delivered to him. Sometime in November, 1912, these three certificates, with a letter accompanying the same, were endorsed by him in blank and enclosed in an envelope and sent to said Fannie N. Burns, who then resided in Cleveland, Ohio, with a request that the other certificates, then in her possession, should be returned to him, which request was complied with by Mrs. Burns. The certificates so returned were handed to the secretary of said company, after the name of said decedent, which had been endorsed thereon in pencil, had been erased. The three certificates so sent to Fannie N. Burns were also endorsed by said decedent, in blank, by writing his name on the back of the same with pencil. These certificates were in the ordinary form of common stock certificates of an Ohio corporation, with a printed form of assignment on the back, to which his signature in pencil was appended. Said certificates of said corporation were offered in evidence and are the capital stock certificates Nos. 42, 43 and 44.

The defendant Fannie N. Burns claims to own said three certificates and the capital stock of said corporation represented by them, and filed an answer and cross-petition in this action setting forth with particularity her claims in the premises. She bases her claims upon three grounds: 1. That they were given to her by decedent in his lifetime. 2. That they were specifically bequeathed to her by the express terms of the will of said decedent. 3. That if they are not expressly given to her by said will, they are given to her by implication.

The defendants William E. Gosser and Frank Gosser are brothers of said decedent, and with the four minor children of a deceased brother are the next of kin and heirs at law of said Charles F. Gosser, deceased. They deny that there was a gift of said stock to said Fannie N. Burns and deny that the same was given to her by the will of decedent, either expressly or by implication. The contention of William E. Gosser and Frank Gosser is that Charles F. Gosser died intestate as to these 502 shares of stock, and that they descend as intestate property under the laws of descent and distribution, to his heirs at law.

These are the two principal contentions in the case. There is still another claim made, which was mentioned at the trial, but in support of which no brief was filed.

The minor children of the deceased brother of said Charles F. Gosser are residuary legatees under his will. If the claim of gift or bequest in favor of Fannie N. Burns should fail, and it should be held that said decedent did not die intestate as to these shares, they would then become a part of the residuum of his estate and pass to said minor children by the express terms of his will.

The defendants William E. Gosser and Frank Gosser contend that a gift to said Fannie N. Burns, if one were intended, failed because said decedent never parted with his control and dominion over the stock, even after it had been indorsed and delivered to her. He continued to vote the stock at the annual meetings of the stockholders, drew all the dividends declared thereon and deposited the same to his own bank account, and to all appearances acted as the owner of said stock, which was never transferred out of his name on the stock books of said corporation, but was in his name on said books at the time of his death.

To constitute a gift *inter vivos*, two things must concur on the part of the donor:

First, he must have the intention of making the *gift*; and, second, he must deliver the thing intended to be given to the donee, *in praesenti*, parting with all dominion and control over it. This must be followed by acceptance of the thing given,

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by the donee. When these elements concur, the transaction becomes a perfect or complete gift.

Did decedent intend to make a gift of this stock to Fannie N. Burns?

We think he did. His letter to her enclosing the stock certificates, his declarations to Mary W. Burns and to Eleanor Mitchell, and the recitations of his will, all show such intention. They all stand uncontradicted, and they can not be construed consistently with any other intention.

There was also a delivery of the thing intended to be delivered, so far as the same could be made. The stock itself is an incorporeal thing, incapable of being delivered except by that which represents it, the stock certificates. Stock certificates aggregating 502 shares, issued to said Charles F. Gosser in his lifetime, were delivered by him, indorsed in blank, to the said Fannie N. Burns, and the same were kept and retained by her, in her possession, and under her control until his death. The legal effect of such delivery is defined by statute as follows:

"Sec. 8673-1. Title to a certificate and to the shares represented thereby can be transferred only,

"(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby. * * *

"Sec. 8673-6. The endorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in Section 7 (Section 8673-7), though the indorser or transferer, * * *

"(d) Has received no consideration."

These sections are part of an act entitled, "An act to make uniform the law of transfer of shares of stock in corporation." (102 O. L., 500.)

The indorsement and delivery of said certificates by the said decedent passed the legal title thereto to Fannie N. Burns. Of this, we think, there can be no doubt.

Did such title pass to her as donee of said stock, or as trustee of the same for the benefit of said decedent? It must have been in one of these two ways. There was no consideration for the transfer and the record does not disclose any declaration

of trust on the part of decedent or of Mrs. Burns for his benefit. In legal effect such transfer must therefore have been a gift to her, unless such transfer can be impeached under the provisions of Section 8673-7, General Code.

There is nothing in the answer of William E. Gosser and Frank Gosser that states a cause of action in their favor or a defense to the claim of Fannie N. Burns to said stock, under the provisions of Section 8673-7.

Did the said decedent exercise such control over said shares as to defeat any intended gift of the same to said Fannie N. Burns?

We have seen that he had the intention to make such gift and that an unconditional delivery of the stocks to her had been made. This would constitute a perfect and completed gift. After such gift had been made and the property passed thereby to the donee, the parties to such transaction could deal with each other in relation thereto just as though the transfer had been made by a sale or any other way than by gift. The record shows his control and dominion over the shares, but it does not show his authority to exercise such control and dominion, or whether he had any such authority. It does not show anything in relation to it, and his acts in the exercise of such control and dominion may have been with the fullest authority from her. At least there is nothing shown to the contrary. And besides, he exercised the same control and dominion over her other property as he did over these 502 shares of stock. This is shown by the record. There was a secrecy about the whole transaction that covered up everything that was not absolutely necessary to be made known. She never asked the officers of the corporation to transfer the shares to her own name, nor did she demand the dividends, nor in any other way did either of them disclose to the corporation that said certificates had been transferred to her. He continued to hold himself out to the world as the owner of the stocks and at the same time was sending her large sums of money. Who knows what accountings were had, or were intended to be had between them? We do not say there were any. We do not know, and the record does not disclose anything in relation

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to it. It neither sustains nor impeaches the claim of either of the parties in this particular. If a completed gift be shown, the burden of impeaching it is on him who asserts that there is no gift.

Without discussing this phase of the subject further, it will be sufficient to say that we hold there was a completed gift *inter vivos* of the stock in question from the said Charles F. Gosser to the defendant Fannie N. Burns, in November, 1912, if not prior to that time, and that she had possession and was the owner of the same at his death in September, 1916.

This conclusion in itself disposes of the claims made under the will of decedent with reference to said shares of stock. If Fannie N. Burns was the owner of said stocks, at the date of testator's death, there was no title remaining in him, at least none shown by the record, on which his will could operate. There is but one contingency, as we view it, in which it would make any material difference whether the language of the will with reference to these shares is dispositive or not, and that is in the event that the defendant Fannie N. Burns took the title to said shares, by delivery of the certificates, in trust for the benefit of said testator. In such case he would still be the beneficial owner of such shares, with the consequent right to dispose of them by will. There is no such case made by this record, and we find upon the principal contention for the defendant Fannie N. Burns—that she is the owner of said stock certificates Nos. 42, 43 and 44, aggregating 502 shares of the common capital stock of the said The Pope-Gosser China Company, with all the incidents of such ownership, and entitled to have such shares transferred to her on the stock books of said corporation.

Referring again to the claims of William E. Gosser and Frank Gosser, it is not to be believed that Charles F. Gosser, the decedent, would segregate the larger part of his estate for the sole purpose of dying intestate as to the part so segregated. Such in legal effect is the claim of the said defendants. They say (1) there was no completed gift to Fannie N. Burns, (2) there is no *bequest* to her of the 502 shares by the will of said testator, and (3) said shares are expressly exempted from

passing to the residuary legatees, as a part of the residuum of his estate, by the plain and explicit language of the will itself; that therefore testator died intestate as to these shares.

The presumption of law is otherwise. If a man takes the pains to make a formal will, disposing of his estate, the presumption is that by such will he meant to dispose of all of his estate, and to overcome such presumption it must appear clear that he did not dispose of it or of some part of it. So far as any pronounced intendment of the testator appears by his will, Fannie N. Burns, Mrs. Chester A. Smith, Ruth Gosser, and the widow and children of Clarence Gosser, deceased, are the beneficiaries and the only beneficiaries entitled to share in the distribution of his estate. He had his whole estate in mind when he wrote his will. Nothing was omitted, so that if he died intestate as to any part of his property it is because he failed to use apt terms to dispose of the same, and to carry out the intention that seems so plainly apparent. It seems to be conceded by all parties that the intention of the testator is clearly ascertainable, and that if there is to be any failure in carrying this intention into effect it is because there is no authority on the part of the courts, under the settled rules of law, to declare and enforce such apparent intention.

To recapitulate, without further discussion, we find and hold:

1. There was a completed gift of said 502 shares of stock to the defendant Fannie N. Burns, by indorsement and delivery to her of the stock certificates representing the same.

2. That the language of the will of said decedent relative to such shares, if not expressly dispositive, clearly shows the intention of the testator that the same would be the property of said Fannie N. Burns, and is sufficient to convey title to said Fannie N. Burns, if for any reason the prior gift should fail in the lifetimes of the donor. *Moon, Admr., v. Stewart et al*, 87 Ohio St., 349.

3. That the testator did not die intestate as to any of the property owned by him at his decease.

Decree accordingly.

HOUCK and SHIELDS, JJ., concur.

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Muskingum County.

INJURIES ON DEFECTIVE SIDEWALKS.

Court of Appeals for Muskingum County.

JOSEPHINE G. ADAMS, v. THE CITY OF ZANESVILLE.

Decided, May 22, 1919.

Municipal Corporations—Knowledge of the Condition of a Defective Sidewalk Precludes Recovery for Injuries Received Thereon.

An action does not lie against a municipality for injuries received by a pedestrian on a defective sidewalk, where it appears from the testimony that the plaintiff was fully aware of the condition of the walk and attempted to pass over it regardless of the danger.

A. A. George, for plaintiff in error.

J. Ernest Harkness, City Solicitor, contra.

HOUCK, J.

The error complained of in this case is to the trial judge's sustaining a motion for a directed verdict in favor of the defendant below, the defendant in error here.

The suit was one for personal injuries, alleged to have been received by plaintiff, and caused by a defective sidewalk in the city of Zanesville.

The answer was in the nature of a general denial; and it affirmatively averred that if plaintiff was in any way injured it was the result of her own negligence and carelessness in the premises.

We have read all the evidence offered by plaintiff in the trial of the case, and it has brought us to the unanimous conclusion that plaintiff failed to produce any legal evidence that would justify a finding by a jury or a court in her favor.

The evidence clearly shows that whatever injuries the plaintiff received, at the time and place set forth in her petition, were the result of her own negligence. Plaintiff was familiar with the sidewalk in question and had known of its dangerous condition for some time prior to the time she received the injuries of which she complains.

In her cross-examination the plaintiff testified as follows:

Q. Mrs. Adams, how long had this condition in the sidewalk, where you were injured, existed? A. It has been in that condition for a long time.

Q. How long? A. Well, I will tell you; I have always been afraid to go up that way. The pavement has been in a bad condition a long time.

Q. How do you know it was in bad condition? A. I have seen it myself.

Q. Yourself? A. Why, sure.

Q. How did you happen to see it? A. I looked at it.

Q. You saw these places before the accident; tell how they looked; describe them fully. A. Well, do you know how raised brick look?

Q. Yes. A. Well, that is just the way it looked and some of the brick were sunk down.

In the instant case, as conceded by the plaintiff in her testimony, the defect in the sidewalk and its dangerous condition were apparent and were clearly seen and observed by the said plaintiff, and its condition had been known to her for some time prior to the time she was injured.

The defect in the sidewalk was known to plaintiff and the danger obvious and such that a reasonably prudent person would not have ventured thereon. There was danger ahead, the peril was well known to plaintiff, and yet she voluntarily and unnecessarily "pressed on," not using or exercising that prudence and care that a reasonably careful person would or should do under such circumstances, and therefore she did so at her own risk.

Applying this rule of law, which we hold is sound, to the conceded facts in this case, the plaintiff was not entitled to recover.

The plaintiff in error contends that the question of negligence was for the jury to pass upon. True, it is, when there is a dispute of fact as to the negligence; but here the negligence is admitted, and there being no disputed question of fact, there is nothing to submit to the jury.

Finding no error in the record, the judgment is affirmed.
Judgment affirmed.

SHIELDS, J., and PATTERSON, J., concur.

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Cuyahoga County.

**ACTION AGAINST THE SURETY OF A DEFAULTING
CONTRACTOR.**

Court of Appeals for Cuyahoga County.

(Walters, Middleton and Sayre, JJ., of the Fourth District sitting in
place of Dunlap, Vickery and Washburn, JJ.,
of the Eighth District.)

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND V. THE CITY
OF CLEVELAND.

Decided, July 2, 1919.

*Sureties—Alleged Misleading Representations—Whether of a Character
to Avoid the Bond is a Question for the Jury—Alterations in Con-
tract after the Bond was Executed—Conclusiveness of a Former
Judgment—Effect of Erroneous Dismissal of Surety—Direct Obliga-
tion Distinguished from Responsibility Over.*

1. It is a fundamental rule of pleading that a general demurrer to any pleading, containing two or more causes of action or defenses, may not be sustained if any one cause of action or defense therein is well pleaded.
2. A surety has the right to have determined primarily by a jury whether representations upon which he claims to have relied to his injury were sufficient to justify an avoidance of the contract of suretyship.
3. Provisions which permit of alterations or modifications of a contract, for the purpose of taking care of conditions and situations arising during the course of the work and which could not be anticipated at the time of making the original agreement, are such modifications as do not increase the liability of the surety. Whether other modifications have resulted in increasing the liability of the surety is a question which he is entitled to have determined by a jury, and if found to be material and to have substantially increased such liability, they are fatal to the right of the obligee to recover on the bond.
4. The conclusiveness of a judgment against a contractor and his surety can not be maintained as to the surety, where it was rendered in an action from which the surety had been dismissed, and therefore

*Motion to require the Court of Appeals to certify its record in this case dismissed by the Supreme Court, December 9, 1919.

Fidelity & Deposit Company v. Cleveland. [30 O.C.A.]

at the time the judgment was rendered was not a party nor in privity with anyone who was a party; and this is true notwithstanding the order dismissing the surety was probably erroneously entered.

Heard on error to the Court of Common Pleas

W. S. FitzGerald, and *Alfred Clum*, for plaintiff in error.

Tolles, Hogsett, Ginn & Morley, and *Hoyt, Dustin, McKeehan & Andrews*, contra.

MIDDLETON, J.

It appears from the record herein that on the 22nd day of August, 1896, the plaintiff in error, the Fidelity & Deposit Company of Maryland, hereinafter designated as the surety company, executed and delivered to the defendant in error, the city of Cleveland, a certain bond in the sum of \$262,000, conditioned for the faithful performance of a contract by one W. J. Gawne. This contract was one for the construction of a lake tunnel, which was intended to afford the city a better and purer supply of water. The conditions of the bond were as follows:

"THE CONDITION OF THIS OBLIGATION is such that, whereas, the above named principal did on the 22nd day of August, 1896, enter into the foregoing agreement with the said city of Cleveland, which said agreement is made a part of this bond the same as though fully set forth herein:

NOW, if the said party of the second part in the said foregoing agreement, shall well and truly execute all and singular the stipulations of said agreement by him to be executed, and shall pay all just and legal claims for labor performed upon, and for materials furnished for the work specified in the said agreement, then this obligation to be void, otherwise to remain in full force and virtue in law; we agreeing and hereby consenting that this undertaking shall be for the use of any laborer or materialman, having a just claim as aforesaid as well as for the said city of Cleveland, and further, that the parties to the foregoing agreement may, from time to time, and as often as they see fit, make any additions to, omissions from, or modification of the work and the said agreement, which in the judgment of the said parties do not materially increase the liability thereon, without consulting the sureties hereto, and without in any way affecting their liability hereon."

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Subsequently this action was brought by the city against the plaintiff in error to recover the full penalty of the bond. The amended petition, on which judgment was rendered in the court below, contains two causes of action. In the first cause of action the city alleges a breach of the contract on the part of the contractor Gawne, and avers violations of the conditions of said contract on his part, the doing of defective work and the use of defective materials, and his refusal to make proper repairs necessitated by such defective work and material, and many other breaches of the contract. The amended petition further alleges that the city was obliged to complete the work by the expenditure of a large amount of money, whereby the contractor and the surety company became indebted to it in the sum of \$262,000, with interest from the first day of January, 1904.

In the second cause of action the city alleges that on the 4th day of April, 1905, said contractor began an action in the court of common pleas of this county against the city, in which he claimed a balance due on said contract of \$123,147.34; that the city filed an answer and cross-petition in said action and made the surety company herein a party defendant; that said cross-petition set forth the bond aforesaid and the breaches of the contract by the contractor Gawne aforesaid, and asked a judgment against said contractor and against said surety company in the full amount of the penalty named in the bond. It is further alleged in said second cause of action that a summons was issued or said cross-petition and served upon the surety company, and that the surety company thereupon filed a demurrer to said answer and cross-petition upon the ground that there was a misjoinder of parties defendant; that said demurrer was thereafter sustained by the court and the cause thereupon proceeded between the contractor and the city, resulting in a judgment in favor of the city and against the contractor in the sum of \$234,802.85, whereby a judgment is asked against the surety company in the present action for the full penalty of its bond, amounting to \$262,000.

To this amended petition the surety company filed an amended answer containing many defenses, which hereinafter will be noted more in detail. A general demurrer to said amended answer was sustained by the trial court, and the surety company

not desiring to plead further a judgment was entered against it for the full amount of said bond, namely, the sum of \$262,000 with interest. These proceedings are now prosecuted to reverse that judgment.

From the opinion of the learned trial judge, filed with the briefs herein, it seems that the general demurrer to the amended answer was sustained upon the theory that the judgment obtained by the city against the contractor in the first suit, as set forth in said second cause of action aforesaid, concluded the surety company in respect to all matters litigated in that case or which might have been litigated; in other words, that the judgment recovered in the first case was *res adjudicata* as to all questions of the surety's liability to the city. The trial court's conclusions in this regard are stated in the opinion as follows:

"In an action against a surety, where the covenant is that the principal shall well and truly execute all and singular the stipulations on his part to be performed, the judgment in the original case between the obligee and the principal is conclusive against the surety, due notice of such suit having been given as to all matters which were or which could have been adjudicated between the obligee and the principal. Such judgment will not conclude the surety from setting up any defense which is purely personal as to the surety or which would relieve the surety from liability on its bond, and the surety may set up a defense for fraud or collusion between the principal and obligee."

The learned trial court, then applying the law so determined by him to the facts pleaded in the amended answer, held that the defenses numbered two, three, four and five therein dealt with matters which were or might have been litigated in the original suit, and therefore, constituted no defense in the instant action. It may be admitted that all of the facts pleaded in said defenses have to do with matters which could have been litigated in the former action had the surety company the opportunity so to do. But it did not have that opportunity, and as the first cause of action in the amended petition is founded wholly on alleged breaches of the contract by Gawne, and therefore tenders the same issues on the part of the city as were presented by it and determined in the original action, it certainly follows that so long

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as the city stands upon this first cause of action these defenses are pertinent and proper to the issues thus presented. A general demurrer, therefore, to the amended answer as a whole could not properly be sustained. It is a fundamental rule of pleading that a general demurrer to any pleading containing two or more causes of action or defenses may not be sustained if any one cause of action or defense therein is well pleaded. (Bates Pl. & Pr., Vol. 1, p. 415). For that reason, if no other, a general demurrer to the amended answer should have been overruled.

In the first special defense in the amended answer the surety company pleads that the bond never went into effect nor became binding. It alleges that certain misleading statements were made by the city which affected the risk and which were material to the surety, and by reason of which it should be released from the bond.

Further pleading in this defense it states that the contract between Gawne and the city, made a part of the bond executed by the company, was materially altered without the surety's knowledge or consent before it was accepted by the city, and that by reason thereof it never went into effect and never was intended to, nor did it, secure the performance of the contract as actually entered into by Gawne and the city. The matters in this defense were held insufficient on the theory that the bond itself provided for the alterations made in the contract before it was accepted, and the misleading statements relied upon by the company as a defense were not material.

We regard the facts pleaded in this defense as sufficient to raise a question for the determination of a jury. The company has a right to have a jury determine primarily whether the misrepresentations it relies upon are sufficient to justify an avoidance of the contract on its part. This defense, however, is subject to a motion to make more definite.

In respect to alterations made in the contract before it was accepted by the city, it is not our conclusion that such alterations are provided for in the bond. The bond does not provide in specific language that alterations may be made in the contract before it is accepted by the city. The manifest purpose of these provisions permitting an alteration or modification of the con-

tract, and of the work to be done thereunder, is to take care of conditions and situations which may arise in the course of the construction of the tunnel and which could not be anticipated in the making of the original agreement. We do not hold that every alteration or modification of this contract after the bond was executed and before the bond and the contract were accepted by the city would release the surety and vitiate the bond. We are, however, convinced that a material alteration or modification in the contract before its acceptance would have that result, and that whether or not such modification increased the liability of the surety is a question for a jury and may not be determined by the city and Gawne under the authority of the bond. This is so, because the provisions of the bond relied upon as authorizing such modifications did not become operative until both the contract and the bond were accepted. Both constituted one contract in so far as the liability of the surety was involved. When they were presented to the city no substantial change could be made in either without the knowledge and consent of the surety. Whether the alterations or modifications complained of were and are material to the surety is, in our judgment, as before observed, a question for the jury; and if determined by the latter to have been material, and such as to substantially increase the liability of the surety company, they are fatal to any right to recover on the bond. We are, therefore, not in harmony with the conclusions of the learned trial judge in his determination of the sufficiency of the first special defense.

We now come to consider what may be regarded as the controlling question in this case. The city's second cause of action, as before noted, is founded upon a judgment it recovered against Gawne in a prior suit on the contract. To this cause of action the surety company now pleads that, after the filing of the so-called answer and cross-petition of the city in said former suit, it filed a demurrer to said answer and cross-petition, upon the grounds that there was a misjoinder of parties defendant therein, that several causes of action were improperly joined, and that separate causes of action against several defendants were improperly joined in said answer and cross-petition. It alleges further in its sixth defense that a final judgment was entered in said action in favor of it upon said demurrer, from which judg-

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ment no proceedings in error were prosecuted and the same became a final judgment in favor of the surety company, and that said judgment still stands unmodified and unreversed. Pleading further it says:

“That by virtue of the foregoing it was not, and should not now be held to be or have been, bound in any wise by any adjudication had or made in said action other than the adjudication made in its behalf upon said demurrer. * * That it should not be in any wise bound by any judgment in said action or proceedings, and that the city of Cleveland is now, by virtue of the judgment entered in favor of this answering defendant upon the sustaining of its demurrer, forever stopped from claiming this answering defendant is or was bound by any adjudication, finding or judgment entered or made against W. J. Gawne in said action.”

The court below found that the surety company was concluded by the judgment against Gowne, and could not in the instant case relegate any matters which were or might have been litigated in that suit. This ruling is very vigorously attacked by the surety company, and just as strenuously defended by the city.

It would be impossible within any reasonable limits to notice in detail the authorities submitted by counsel upon both sides in support of their respective claims on this question. In a general way it may be noted that many of the cases relied upon in support of the claim of the finality of the former judgment are cases in which the defendant was by law or contract responsible over to the party claiming the conclusiveness of the judgment. The general rule in this character of cases is well stated in Am. & Eng. Ency. Law (2 Ed.) Vol. 24, p. 740, *et seq*:

“Where a person is responsible over to another, either by operation of law or by express contract, for whatever may be justly recovered against such other, and he is duly notified of the pendency of the suit and requested to take upon himself the defense of it and is given the opportunity to do so, the judgment therein, if obtained without fraud or collusion, will be conclusive in a subsequent suit against him for the indemnity, whether he appeared or not.

“In such a case the person responsible over is no longer regarded as a stranger, because he has the right to appear and de-

fend the action, and has the same means of controverting the claim as if he were the real and nominal party upon the record, and it would be unreasonable to permit him to contest the justice of the claim in the suit against himself after having neglected or failed to show its injustice in the suit against the person he was bound to indemnify."

Clearly, the instant case is not within the letter or reason of this rule. The surety's obligation here is a direct obligation to the city, which was the plaintiff, and not to Gawne, who was the defendant, in the former action. The surety company owed no duty to Gawne to defend the former suit, and it had no opportunity in that suit to defend against its own liability. Under the plain terms of its bond it made itself directly responsible to the city for the faithful performance of the contract by Gawne, and upon a breach thereof by him the city had a right of action against it, which action might be either joint or several.

In the case of *Walsh Construction Co. v. City of Cleveland and National Surety Co.* (16 O.L.R., 62), in the United States court, Northern District of Ohio, Eastern Division, a bond, identical in every respect to the one involved in the instant case, was before the court for construction upon a demurrer to the cross-petition, which demurrer was based upon the same grounds as the demurrer of the surety company in the original case against Gawne. Judge Westenhaver, in discussing the liability of the principal and surety under the bond, says:

"The fundamental assumption of this argument is that the construction contract and the performance bond are separate and independent contracts. This assumption can not be admitted. On the contrary, these several documents are expressly made a part of the same contract. They were all executed at the same time upon the same consideration, and for the same purpose, and took effect by a single delivery. As a result there is in law but one contract. A simple test of the question presented, is whether or not an original action against the Walsh Construction Company and its surety could be maintained on the third cause of action set up in the cross-petition. Such an action on well settled legal principles could undoubtedly be maintained without first compelling the obligee to sue the principal on the contract and exhaust his remedies against him. Both defendants have agreed jointly and severally to perform all the terms of the con-

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struction contract. They are in law joint and several contractors and obligors. The surety's obligation is not that of an indemnitor or of a collateral guarantor against whom no action can be brought without demand or notice or until after failure to collect from the principal; the obligation is an absolute and unconditional one, binding both principal and surety for the full performance of each and everyone term, condition and requirement of the contract. A joint or separate action might at common law and under sections 11256 and 11258, General Code of Ohio, be brought thereon. *Stage v. Olds*, 12 O. R., 159; *Neil v. Board of Trustees*, 31 O. S., 15; *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala., 362; 36 Am. St. Rep., 210."

This able interpretation of the rights and liabilities of the parties to a contract of the kind involved here is, in our judgment, a correct statement of the law.

Many cases have been examined by us in which, under bonds of the kind involved here, a judgment of a materialman against the obligee was held conclusive against the surety. The conditions surrounding cases of that kind, however, are entirely different from the circumstances here. In those cases there was a responsibility over; that is to say, the obligee of the bond was the defendant in the original suit, and therefore should not be compelled after he had given notice to his surety to relitigate the claims made against him. We have also examined very carefully the case of *McConnell v. Poor*, 113 Iowa, 133, 84 N. W., 968. This case appears to support the contention of the surety company in the instant case. It is there said:

"The defendant in the case at bar was not a party to the contract, nor could he have insisted on being made a party to the action between Evans and McConnell thereon. The latter might have brought suit against both principal and surety on the bond; but he chose, as was his right, to base his action on the contract alone. Even if these might have been regarded for some purposes, as one instrument, the appellant elected to treat them as distinct and separate by basing his suit against Evans solely on the contract, and that against Poor on the bond. The surety may require the principal to defend, for this is his duty; but the surety owes no obligation to defend him. * * * Privity, says Greenleaf, denotes mutual or successive relationship to the same right of property. Privity in law involves the right of rep-

resentation, and certainly the principal, in an action against himself alone, may not represent the surety."

In the case of *Friend v. Ralston, et al*, 77 Pac., 794, it was held that a judgment obtained in good faith by the owner of the building against the contractors for breach of the conditions of the contract, is conclusive against the surety in an action to recover on the bond if there was no fraud or collusion in obtaining the first judgment. This case discusses the case of *McConnell v. Poor, supra*, and the court in referring to the latter case say:

"The case of *McConnell v. Poor*, 113 Iowa, 133, is an authority upon which appellant places its principal reliance, but we fail to discover wherein it is in conflict with the conclusions heretofore declared respecting this feature of the present controversy. Notwithstanding the statement in the syllabus, the case fails to show that the surety had notice of the prior suit against his principal, or was given any opportunity to appear and defend such action, and it further appeared that the plaintiff had elected to treat the bond and contract as separate instruments for the purposes of the litigation. The able court properly held that a judgment rendered in favor of the obligee for breach of the contract against the principal did not estop the surety, when sued on the contractor's bond."

A consideration of all the cases will disclose, we think, that the courts have been inclined to base their conclusions in each case on some particular facts involved, and were not inclined to apply any infallible rule or doctrine of law. This we are disposed to do in the instant case, because it presents certain facts which are not to be found in any of the cases cited and which, in our judgment, removes it from the operation of any general rule which has been applied in other cases. We are, however, inclined to the opinion that there is no more foundation for the claim of the city of the conclusiveness of the former judgment than there would be if that judgment had been recovered against Gawne upon a joint and several promissory note executed by Gawne and the surety company, instead of the contract and bond in this case.

Where the rule of the conclusiveness of a former judgment has been applied by the courts they all agree that two things must

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be present: first, there must have been a notice to the surety of the pendency of the original suit, and the surety must have had the opportunity to defend. In the instant case the last essential element is lacking. The surety company in the suit against Gawne had no opportunity to defend. The court in that case, in ruling upon the demurrer, said to it in so many words: "You are a stranger to this action.. You can not be heard in this suit. Your liability to the city of Cleveland is not a joint liability with Gawne, but it is a several liability, and the city can only assert its claims against you in a separate and independent action."

The amended answer avers that the judgment on the demurrer is still in full force, unmodified and unreversed. While the answer does not plead upon what ground the demurrer was sustained, that is immaterial as all were directed to the question of a joint liability, and whether it was sustained on all the grounds or only one of them the result is the same. It was a determination by a court of competent jurisdiction that the liability of the surety company under its bond was a several and independent liability. It was a determination, in other words, of all the matters legitimately involved in a consideration of the law invoked by the demurrer, and was and is conclusive against the city. It is now urged that this judgment was erroneous. In that contention we fully concur; but if erroneous, it is none the less binding and effective. It is said in 7 Howard, 48 U. S., 612-624:

"It is a doctrine of law, too long established to require a citation of authorities, that where a court has jurisdiction it has the right to decide every question which occurs in the case, and whether its decisions be correct or otherwise its judgment, till reversed, is regarded as binding on every other court."

It was once said by an eminent judge in commenting upon the finality of a former adjudication that a judgment of a court of competent jurisdiction, if based upon erroneous notions of law or founded upon false evidence, was, nevertheless, when rendered by the court, the "infallible truth." These principles, however, are elementary. The judgment on the demurrer in the original suit determined conclusively the manner or mode by which the city could then and thereafter enforce its rights against

the contractor and the surety company. It was an adjudication by a court of competent jurisdiction of all the remedies available to the city in respect to any claim it might desire to assert against the contractor and his surety growing out of the breach of the contract by the former. It was not, of course, a judgment on the merits of such a claim, but it was a determination against the city in respect to its right to prosecute a joint action against Gawne and the surety company; and, right or wrong, this court and other courts are bound to observe it in subsequent litigation between the same parties in respect to the same subject-matter. This being so, upon what theory may the city now plead the law of *res adjudicata* against the surety company? It was not a party to the former suit when the judgment was rendered; nor, under the ruling of the court, was it in privity with anyone who was a party at the time the judgment was rendered. Privity, as declared in *McConnell v. Poor, supra*, involves the right of representation. If the surety company could not represent itself in the original action, how may it now be claimed that it was represented by Gawne?

We are impelled to conclude that the judgment in the original case, dismissing the surety company from that suit, while erroneous, is nevertheless binding upon all the parties to this suit, and therefore completely estops the city from now claiming any adjudication in the former case of the merits of its claim against the surety company. That judgment confined the city to a several action against the surety company, in which any and all defenses affecting or relating to the latter's liability are available to it. In other words, the city must now prosecute its claim against the surety company as if the judgment against Gawne in the original action "is not, and never was."

An amendment to the petition in error was filed, and a motion to strike this amendment from the files was submitted to the court. Under our conclusions in this case we regard this amendment now as immaterial and that the motion should be sustained. One of the things which the amendment sought to bring into the case was the insufficiency of the amended petition. As the case must now be retried, we would suggest that the first cause of action in the amended petition be amended so as to show a perform-

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ance by the city of all the conditions of the contract on its part to be performed. We regard the first cause of action in the present amended petition defective in that respect.

In view of the foregoing considerations, the demurrer to the amended answer should have been overruled and the judgment of the lower court, therefore, in sustaining the same is reversed, and the case is remanded to the court of common pleas of this county for further proceedings according to law.

WALTERS and SAYRE, JJ., concur.

MODIFICATION OF JUDGMENT.

Court of Appeals for Clinton County.

IN RE ROBINSON.

Decided, January 7, 1917.

Sheriff—Empowered to Transfer Prisoners—When a Different Workhouse has been Designated for Their Incarceration—Court Without Power to Modify Its Sentence After Expiration of Term—Habeas Corpus.

1. A court of common pleas has no power or authority to modify its judgment after the term at which it was made has expired, except in a manner pointed out by statute.
2. Where a defendant is sentenced by a common pleas court to pay a fine and costs and to stand committed to a certain workhouse until the fine and costs are paid or until he is discharged by due process of law, the subsequent abrogation by the county commissioners of their contract with such workhouse and the notification by the workhouse authorities to the commissioners to remove such defendant, do not authorize the court, after the term at which such defendant was sentenced, to modify the judgment entry by finding the amount of fine and costs not worked out and ordering the defendant committed to another workhouse until such sum shall be paid by the labor of the defendant or until the balance of the fine and costs should be paid by him.
3. Under such a state of facts the sheriff of the county is authorized to transfer the defendant to the workhouse which the county had provided for the incarceration of prisoners sentenced by its courts,

regardless of the lack of authority of the common pleas court to modify its judgment.

Hayes & Hayes, for Ben Robinson.

Joe T. Doan, prosecuting attorney, for state of Ohio.

Error to the Court of Common Pleas of Clinton County.

BY THE COURT.

This proceeding was originally one in *habeas corpus* brought by Ben Robinson, claiming that he is unlawfully restrained of his liberty by the sheriff of Clinton county.

It appears that at the October term of the common pleas court of Clinton county Ben Robinson was indicted on two separate indictments, one charging him with unlawfully selling intoxicating liquors to a minor, and the other charging him with keeping a place where intoxicating liquors were sold contrary to law. These indictments were numbered separately 3325 and 3326. Upon being arraigned Robinson pleaded guilty to both indictments; and the court adjudged him to pay a fine of \$100 and costs in each case, and to stand committed to the Cincinnati workhouse to be kept at hard labor until the fines and costs were paid, or until he should be discharged by due process of law.

Robinson was taken to the Cincinnati workhouse and turned over to the authorities of that institution. He continued there until March 31, 1916, at which time the authorities of the Cincinnati workhouse notified the county commissioners of Clinton county to remove Robinson from the Cincinnati workhouse and that they would no longer be responsible for his care.

The commissioners of Clinton county had, prior to the October term, 1915, a contract with the workhouse authorities of the city of Cincinnati for the receiving and maintenance of the prisoners committed thereto by the courts of Clinton county. This contract the commissioners of Clinton county abrogated and rescinded February, 1916, and thereupon entered into a contract with the authorities having control of the workhouse of the city of Xenia.

The sheriff of Clinton county, on being notified that Robinson would not be longer retained in the Cincinnati workhouse, took

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possession of him and turned him over to the authorities of the Xenia workhouse. Before his doing so, however, the court of common pleas made an entry on or about April 5, 1916, modifying the judgment entry of the October term, 1915, in which entry the court found the amount of the fines and costs not worked out by Robinson in the Cincinnati workhouse to be \$32.94 in one case, and \$114.54 in the other, and ordered that he be committed to the workhouse of the city of Xenia until said sums should be paid by the labor of Robinson at the rate of sixty cents per day, or until the balance of the fines and costs should be paid by him. The court of common pleas dismissed the plaintiff's petition in *habeas corpus*, and Robinson prosecutes error to this court to reverse this judgment.

The claim, and practically the only claim urged by Robinson's council, is that the court of common pleas was not authorized in April, 1916, to modify an entry made at the October term, 1915; and that, therefore, Robinson is not held under any sentence or judgment of the court and should be discharged.

Manifestly the court of common pleas had no power or authority to modify its judgment after the term at which it was made had expired, except in a manner pointed out by statute. The reason for modifying the judgment by the court of common pleas in April, 1916, does not fall within any of the grounds set out in the statute, and therefore the court had no power or authority to modify this judgment as to Ben Robinson in either of the cases in which he pleaded guilty. But Robinson having been confined in the Cincinnati workhouse, which was the institution to receive him under the provisions of the contract between the authorities of that institution and the commissioners of Clinton county, the state of Ohio and the county of Clinton had a right to retain Robinson in custody until he complied with the judgment of the court requiring him to either pay his fine and costs or work the same out at the rate of sixty cents per day as provided in the judgment of the court. From the fact that the county of Clinton had no contract with the authorities of the Cincinnati workhouse which would compel that institution to keep Robinson in cus-

tody when this situation presented itself, and had a contract with the authorities of the workhouse of the city of Xenia, the sheriff of Clinton county was authorized and warranted under the law, in our opinion, in transferring Robinson from the Cincinnati workhouse to the workhouse which the county of Clinton provided for the incarceration of prisoners sentenced by its courts; and, therefore, regardless of the power and authority of the common pleas court to modify its judgment, we hold that the sheriff of the county was warranted in taking Robinson from the Cincinnati workhouse and transferring him to the workhouse of the city of Xenia.

In this view of the case the modification of the entry made by the Court of Common Pleas of Clinton County was not prejudicial to Ben Robinson. He was lawfully in the custody of the sheriff at the time the writ of *habeas corpus* was sued out, and the sheriff was authorized to take him to the workhouse of the city of Xenia until the judgment of the court which sentenced him in the October term, 1915, had been complied with.

For the reasons stated the judgment of the court of common pleas will be affirmed.

Judgment affirmed.

JONES, E. H., JONES, OLIVER B., and GORMAN, JJ., concur.

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**MEASURE OF COMPENSATION TO TENANT DISPOSSED
BY FORECLOSURE.**

Court of Appeals for Lucas County.

MICHIGAN MUTUAL LIFE INSURANCE CO. v. SHERIDON ET AL.

Decided, November 18, 1918.

*Landlord and Tenant—Leasehold Sold in Foreclosure—Tenant's Claim
for Compensation Prior to Later Liens—Measure of Compensation.*

1. A tenant in possession, holding under a valid lease with an implied covenant for quiet and peaceable enjoyment of the premises, who is deprived of the leasehold estate by foreclosure and sale of the premises, is entitled to be compensated therefore out of the proceeds of the sale, and such right is a prior claim to that of mortgages or liens executed subsequent to the lease.
2. In such a case the amount of compensation to which the tenant is entitled is the difference between the rent reserved in the lease and the actual net value of the leasehold estate, the amount thus found to be reduced to its present worth.

(To be officially reported in 11 O. App.)

J. A. Barber, for plaintiff.*Calkins & Storey*, for Robert A. Draper and Detwiler Real Estate & Investment Company.*Warren L. Smith* and *Thomas L. Gifford*, for Yondota Lodge, K. P.

RICHARDS, J.

Heard on appeal.

The real estate involved in this controversy has been sold under foreclosure and the proceeds arising paid into court. This sale was made in September, 1917, for \$17,500 to the defendant, Robert A. Draper, and the amount of the first mortgage, together with taxes and costs, has been paid from these proceeds, leaving for distribution the sum of about \$5,500. The matter remaining for disposition is the right of various claimants to this money still remaining in the hands of the court.

The facts necessary for a solution of this question are in substance as follows: In 1904, Sanford W. Cook was the owner of the real estate, situated in East Toledo, and he then mortgaged the same to the Michigan Mutual Life Insurance Co. for \$10,000, his wife, Lottie Cook, joining in the mortgage. Thereafter he conveyed the property to his wife, and in 1912 she entered into a written lease of the property to Yondota Lodge, K. P., for a period of five years from June 1, 1912, at \$40 per month, with the privilege of renewal for another five-year term at a rental of \$50 per month. The Yondota Lodge took possession of the premises and the lease held by it was duly placed on record. In October, 1914, Lottie Cook executed a mortgage on the property to the Walding, Kinnan & Marvin Co., which mortgage was subsequently assigned to the defendant, Robert A. Draper, and there remains still due on the same about \$1,000. Thereafter Lottie Cook conveyed the real estate in fee simple, and it passed by mesne conveyances to the defendant, Sheridan, who, in August, 1915, executed a mortgage on the same to the defendant, The Detweiler Real Estate & Investment Company, and on this mortgage there still remains due about the sum of \$7,500. Yondota Lodge claims an equitable interest in the money remaining in court to the extent of the loss suffered by it in being deprived of its leasehold interest in the premises by the foreclosure and sale. The second and third mortgagee claim that they are entitled to the remaining proceeds and insist that the lodge has no claim whatsoever to any part thereof. The lease held by the lodge gave it the right to sublet the premises, which it was doing to various sub-tenants through the entire period that it occupied the premises. It had elected to retain the premises for the second period of five years at the increased rental of \$50 per month and was receiving during all the time large amounts of rental from its various subtenants. The terms of the lease required the landlord to heat the hall occupied by the lodge and to keep the same in reasonable and necessary repair. The lodge on taking possession under its lease, and with the consent of the landlord, remodeled the room at an expense exceeding \$1,400. The lease held by the lodge contains no express covenant, but there is, of

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course, the implied covenant that the tenant would be entitled to the quiet and peaceable enjoyment of the premises during the term of the lease and for the renewal period provided by the lease.

Counsel for the mortgagees insist that if the lodge has any claim it would be only against the original lessor, and that it has no interest in or lien on the proceeds in court, nor any equitable right to any portion of the same. This claim is based very largely on the decision in *Burr v. Stenton*, 52 Barb. (N.Y.), 377, and on certain text-books which cite and restate the rule which they assume to be there announced; and it must be admitted that a cursory reading of that case seems to lend much support to the contention so made. A careful study, however, of the case of *Burr v. Stenton* shows that it has very decided limitations and must be construed and interpreted in accordance with the peculiar facts existing in the case that the court was then deciding. The lessor in that case was not the owner of the premises at the time he executed the lease, but subsequently became the owner thereof, and the lease which he gave contained an express covenant for the quiet enjoyment of the premises without molestation or disturbance from the lessor, his successors and assigns. There was a mortgage on the premises which had been theretofore made by the former owner. The court held that by reason of the express covenant contained in the lease there was no room for any implied covenant on the same subject-matter, and that as the express covenant was limited by its terms to the acts of the lessor, his successors and assigns, and the mortgage had not been made by the lessor, but by a former owner, therefore there was no covenant either express or implied against the same, and that for this reason, and this reason alone, the tenant was not entitled to share in the proceeds remaining for distribution after the premises had been sold under this antecedent mortgage. The case was affirmed by the court of appeals of New York in *Burr v. Stenton*, 43 N. Y., 462. In the course of the opinion announced by the court of appeals it is stated that the case was considered upon its own merits, leaving a case where there is an express or implied covenant for quiet enjoyment in the lease to be determined when it arises. In the

case at bar we have found that there is an implied covenant for quiet enjoyment, and this distinguishes the case from that of *Burr v. Stenton*, *supra*. The case of *Burr v. Stenton* has been often cited, and numerous restrictions announced which must be placed upon its application to other cases.

We call attention to *Clarkson v. Skidmore*, 46 N. Y., 297, where it was held that a lessee for years of mortgaged premises, who holds under a lease containing a covenant of quiet enjoyment, is entitled to receive out of the surplus moneys arising on foreclosure the value of the use of the premises for the remainder of his term, less the rents reserved. The court in the opinion distinguishes this case from *Burr v. Stenton* by pointing out that the lease in that case contained no express or implied covenant of quiet enjoyment except against the acts of the lessor. In the decision of the lower court in *Clarkson v. Skidmore*, 2 Lansing, 238, it is expressly stated that *Burr v. Stenton* does not control. It may be noted in passing that the decision of the court of appeals in *Clarkson v. Skidmore*, *supra*, was rendered by the same judges who decided the case of *Burr v. Stenton*, *supra*.

The principle that a tenant having the protection of a general covenant for quiet enjoyment is entitled to be compensated out of the proceeds of the sale for the loss he suffers by reason of being deprived of the rights granted him under the lease is also announced in *Larkin v. Misland*, 100 N. Y., 212 (3 N. E., 79); in *Winthrop v. Welling*, 2 App. Div. (N. Y.), 229, and in *Ely v. Collins*, 92 N. Y. Supp., 160.

After all these criticisms and limitations on the case of *Burr v. Stenton* little remains of that case as an authority, and it can not be applied beyond the peculiar facts under which it arose. It is true that in 2 Jones, Mortgages, Sec. 1696, the case of *Burr v. Stenton* is cited as announcing the doctrine generally that a lessee when his interest is cut off by foreclosure is entitled to no part of the surplus arising from the sale. This principle is so stated in the fourth edition of Jones on Mortgages and the statement is repeated in the sixth and seventh editions of that treatise, and this in spite of the peculiar facts existing in the case of *Burr v. Stenton*, which necessarily limit the scope of the

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decision, and notwithstanding the subsequent limitations put on that case by various decisions already cited rendered by the courts of the same state. The learned author of 2 Jones on Mortgages (7 ed.), Section 773, however, states that a lease already existing at the date of the mortgage is in no way invalidated by the giving of the mortgage, and that the lease is a paramount interest and the mortgage subject to it. He also says that the mortgagee has only the rights of the mortgagor as against the lessee. The language is directly applicable to the rights of the second and third mortgagees in the case at bar, and is not consistent with the language used by the author in Section 1696, cited *supra*. Indeed, on a review of the situation disclosed by the record in this case it is apparent that to adopt the contention of counsel for the mortgagees would be in effect to hold that a subsequent lien is prior to any right of the owner of a pre-existing estate in the premises. The lease held by the Yondota Lodge was on record, and the lessee was in possession, and it necessarily follows that the rights of the subsequent mortgagees are subordinate to the rights of the lessee. We are, therefore, of the opinion that the lessee is entitled to be compensated out of the proceeds remaining in court to the extent of the loss suffered by it in being deprived of the estate created by the lease. This compensation should be represented by a lump sum to be ascertained from the evidence, and reduced to its present worth. The amount of this compensation would be the difference between the amount of rent to be paid by the tenant and the actual net value of the leasehold estate.

No useful purpose would be served by reviewing in detail the evidence relating to the value of this leasehold estate or the rentals received by the Yondota Lodge from its sub-tenants. It is sufficient to say that the evidence discloses that during the entire period covered by the lease it had been subletting the premises to numerous tenants and had received during the term of the lease large sums of money and that there had been an increase of the amount so received, showing the enhanced value of the same as time passed. This evidence shows that the lodge-room was sublet to these various tenants at an annual rental which amounted at \$5 per night for each night that the tenant

occupied the same, the Yondota Lodge reserving one night a week for its own use of the same. The total amount received by the lodge is clearly stated in the evidence. It also appears that the expense of lighting the hall was \$100 per year and that janitor service amounted to \$240 per year. After taking into consideration all this evidence, it is perfectly clear that the lodge had a very valuable lease and has suffered substantial damages, and on the evidence contained in the record we find that the amount of the loss suffered by the lodge is \$1,035, which amount is an equitable charge on the fund now in court, and to be first paid therefrom, after the costs of court. The second and third mortgagees are entitled to receive the balance then remaining according to their respective priorities.

Decree accordingly.

CHITTENDEN and KINKADE, JJ., concur.

KNOWLEDGE OF THE UNDER AGE OF AN EMPLOYEE.

Court of Appeals for Hamilton County.

LOCKWOOD ET AL V. THE AETNA LIFE INSURANCE CO.

Decided, June 3, 1917.

Employment of Infant Claiming to be Sixteen Years of Age—His Subsequent Injury and Action for Damages—When Knowledge of Employer of Non-Age is Necessary—Liability of Indemnity Company to Employer.

While it is true that it would be necessary to show an employer had knowledge of the non-age of an employee in order to render him guilty of a misdemeanor in connection with such employment and subject to the fine and imprisonment provided by law, yet such knowledge is not necessary in order to make the employment illegal for the purpose of a suit for personal injuries or under the terms of an indemnity policy referring to illegal employment.

Messrs. Robertson, Buchwalter & Oppenheimer, for plaintiffs in error.

Messrs. Paxton, Warrington & Seasongood, for defendants in error.

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JONES, P. J.

Heard on error.

This is an action brought by plaintiffs in error, Edwin F. and Harry Lockwood, partners, as plaintiffs, against defendant in error, as defendant, under a policy of manufacturers' employers' liability insurance, in which plaintiffs seek to recover the amount of the judgment and costs obtained against them for damages on account of bodily injuries accidentally suffered by a child employed in their factory, by reason of the operation by him of a stamping-press machine used in stamping tinware.

The injured boy, Arthur J. Ruschell, by his guardian, brought an action for his damages by reason of personal injuries suffered during the operation of said stamp press; and George Ruschell, the father of the said boy, also brought an action on his own behalf for loss of services of his infant son by reason of said injury.

Upon the happening of said accident the insurance company was notified by the employers, and upon the filing of the suits copies of the summons in said cases were sent to defendant in accordance with the requirements of their indemnity insurance policy. Thereupon the agents for the insurance company advised plaintiffs of the possible illegal employment of Ruschell, whereupon the plaintiffs answered they were advised that the age was not the important feature of the case, and stated further, "However, we feel we can prove his age." It appears, however, that the boy was fourteen years and four months of age at the date of the happening of the accident, and the defendant was unable to prove to the contrary, although it had been reported to it at the time of the employment that he was fully sixteen years of age.

The defendant claims to have accepted the case and taken charge of its defense, through its attorneys, with the understanding, that, if it appeared at the trial that the statute was violated in the employment of Arthur Ruschell, it would not be responsible for the expenses incurred or for an judgment taken. There is a dispute between the parties as to whether or not these conditions were accepted. At any rate, counsel for the defendant company filed an answer in each case. One case went to trial and was partly heard, when, because of misconduct of one of the

jurors, the jury was discharged and the case continued. Afterwards other counsel employed by plaintiffs were associated with those of the insurance company, and it appearing to the insured that the insurance company would take the position ultimately that the accident and injury were not covered by its policy, an agreement was made, in the form of a stipulation, and filed in the Ruschell suit, as follows:

"Whereas, The Aetna Life Insurance Company of Hartford, Connecticut, by their policy No. E. 20952 (Accident and Liability Department) did thereby insure the defendants in the above entitled cause from the 15th of August, 1905, to the 15th of August, 1906, against loss or expense arising or resulting from claims upon them for damages on account of bodily injuries accidentally suffered by reason of the operation of the trade or business described in said policy; and

"Whereas, the trial and defense of the above entitled cause is now being conducted by the said Aetna Life Insurance Company on behalf of the defendants, in pursuance of the terms of said policy, but that nevertheless, the said The Aetna Life Insurance Company does not contend that the injury to the plaintiff in the said suit was not covered by their said policy, and that said company is not subject to protect any recovery in the case, while the defendants claim that it was covered by the policy and the said insurance company is liable for any recovery.

"Now, therefore, it is agreed and stipulated by and between The Aetna Life Insurance Company and the defendants in the above suit, that they do hereby consent to a verdict being returned by the jury assessing the plaintiff's damages at the sum of \$1,200; and that a judgment may be entered thereon for that amount, from which no appeal or proceedings in error shall be taken; and all of which, together with the payment and satisfaction of said judgment by either party shall be without prejudice to the question, whether said accident and loss was covered by said policy of insurance, and the rights and liability of the parties to said insurance contract.

"Cincinnati, Ohio, this 3rd day of June, 1909.

"The Aetna Life Insurance Company, by T. B. Paxton, Jr.

"The Lockwood Manufacturing Company, by C. D. Robertson,
"its Attorney.

"The same agreement, terms and conditions apply to the suit of the father against the defendants, where the consent verdict is for \$300.

"The Lockwood Manufacturing Company,
"By C. D. Robertson, Attorney."

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At the same time this stipulation was agreed upon a settlement was effected by the attorney for the Lockwoods, and they afterwards paid the judgments in both of these cases together with costs, and, as stated above, this suit is to collect same from the insurance company.

When the accident occurred to Ruschell the act of April 8, 1890 (87 O. L., 161; Section 6986-1, Revised Statutes), was in force, and was as follows:

"No child under the age of sixteen years, shall be employed by any person, firm, or corporation in this state, at employment whereby its life or limb is endangered, or its health is likely to be injured, or its morals may be depraved by such employment."

The record clearly shows that Arthur Ruschell had not reached the age of sixteen years at the time of the accident. Regardless of the belief of the employers and the representations made by the minor to them, his employment was contrary to this statute, and was not covered by the policy of indemnity. While, as argued by plaintiffs, it is true it would be necessary to show that the employers had knowledge of the non-age of the employee, in order to render them guilty of a misdemeanor in such employment, and subject to the fine and imprisonment provided by Section 6986-2, Revised Statutes, yet such knowledge is not necessary in order to make the employment illegal for the purpose of the suit for personal injuries or under the terms of the indemnity policy in question. *Breckenridge v. Reagan*, 22 C. C., 71; *Braasch v. Michigan Stove Co.*, 153 Mich., 652; *American Car & Fdy. Co. v. Armentraut*, 214 Ill., 509; *Krutlies v. Bulls Heal Coal Co.*, 249 Pa. St., 162 (L. R. A., 1915 F., 1082); *DeSoto Coal M. & D. Co. v. Hill*, 179 Ala., 186; *Inland Steel Co. v. Yedinak*, 172 Ind., 423, 87 N. E. Rep., 229; *Holland Laundry v. Travelers' Ins. Co.*, 152 N. Y. Supp., 92, and *Buffalo Steel Co. v. Aetna L. Ins. Co.*, 136 N. Y. Supp., 977.

A case almost similar in its facts and questions involved is the case of *Aetna Life Ins. Co. v. Tyler Box & Lumber Mfg. Co.*, 149 S. W. Rep. (Tex. Civ.), 283.

The record in this case fails to show that the plaintiffs were in any way misled to their injury by the conduct of the defendant company in assuming the defense of the Ruschell cases. It shows further that the settlement of those cases was made not by

counsel for the insurance company, but by their own counsel; and, regardless of whether or not they had fully understood and agreed to the original conditions under which the insurance company undertook the defense, that the judgments were entered with full understanding is shown by the stipulation agreed upon that the insurance company was at liberty to contest its liability.

Objection is made to rulings of the trial court upon the admission of evidence. It appears that the testimony of Arthur J. and George Ruschell was read from a transcript of their testimony given at the former trial of the case, without any reason for so doing being stated to the court. While the testimony shows that at the time it was given the witnesses were beyond the jurisdiction of the court, six years had intervened, and, in the absence of any statement in proof of non-residence, we can not assume its continuance for that length of time. We think, therefore, that it was error in the court to permit the reading of that testimony without proper showing first made. But there is nothing in this testimony, under the facts as shown and the law as we view it, that would make this admission of such substantial prejudice to the plaintiff in error as to require a reversal.

Upon the record as made this court is of the opinion that it was the duty of the trial court to direct a verdict in favor of the defendants; and, finding no errors to the substantial prejudice of plaintiffs in error, the judgment is therefore affirmed.

Judgment affirmed.

GORMAN and HAMILTON, JJ., concur.

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Hamilton County.

**BONDING COMPANY BOUND BY ACTION OF WHICH IT
HAD NOTICE.**

Court of Appeals for Hamilton County.

**AMERICAN BONDING CO. ET AL, v. THE BOARD OF EDUCATION
OF CINCINNATI.**

Decided, May 17, 1917.

*Sureties—Bonding Company Failing to Make a Defense after Notice—
Bound by Judgment Rendered against Obligee—Effect of Consent
of Surety to Payment of Contractor before Due.*

1. A bonding company having been notified of the pendency and nature of an action against a board of education, to which board it is liable on the bond of a contractor signed by it as surety, and having been given an opportunity to make a defense in the case, and having failed to do so, is concluded and bound by the judgment rendered in such action, and can not thereafter question the correctness thereof in another action.
2. Where an owner makes a payment to a contractor in advance of the time when the same was due under the contract, but such payment is made upon the express written consent of the contractor's surety, the surety is estopped from thereafter complaining of such payment.

*Miller Outcalt and Dudley Outcalt, for American Bonding Co.,
and Kornhauser & Morgan, for Michael J. Heintz, plaintiffs in
error.*

*Charles A. Groom, City Solicitor, and Constant Southworth,
Assistant City Solicitor contra.*

GORMAN, J.

Heard on error.

In the common pleas court defendants in error recovered a judgment against the plaintiffs in error in the sum of \$12,992.54 on a bond executed by the American Bonding Company in favor of the state of Ohio for the benefit of defendants in error.

The plaintiff in error Michael J. Heintz had entered into a contract with the defendants in error to erect a school building in Avondale, and to secure the performance of that contract he executed the bond sued upon in this action. After the building

was partly erected Heintz defaulted and failed to complete the work. Thereupon the board of education of the city of Cincinnati notified the surety to complete the contract, which it failed and refused to do, and the defendants were obliged to complete the building.

After the completion of the building there remained in the hands of the board of education, of the contract price, \$7,685.90.

It further appears from the record that Heintz had failed and neglected to pay to his sub-contractors and materialmen moneys due them for work and materials furnished for the erection of the building in the sum of approximately \$19,000. A suit was brought by the sub-contractors and materialmen against the board of education to recover the amount due them for their work and materials, and in case No. 142228 on the docket of the court of common pleas, entitled *The Pittsburg Plate Glass Company v. Michael J. Heintz et al.*, a recovery was had in favor of these sub-contractors and materialmen, and the board of education was obliged to pay in excess of the amount held from the contract price, \$7,685.90, the amount of recovery in the last action brought in the court of common pleas.

In case No. 142228 of the court of common pleas the American Bonding Company was made party defendant, and was subsequently dismissed from the action, but thereafter the board of education vouched in the bonding company by sending notice to it of the pendency and nature of the action, and requesting the bonding company to appear by counsel and participate in defense. This the bonding company refused to do, and after the judgment was rendered against the board of education in said case No. 142228 the board of education notified the bonding company that it was content with the judgment, but that if the bonding company desired to prosecute error or to take any other steps to have the judgment reversed or reviewed it was at liberty to do so; but neither the board of education nor the bonding company took any steps to review the judgment, or appeal therefrom, and said judgment in case No. 142228 in favor of the sub-contractors and materialmen remains in full force and effect, unreversed and unmodified, and the board of education has paid to the various sub-contractors and materialmen the amounts so found to be due them by said court in said case.

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Thereupon this action was brought by the board of education to recover the amount which it had paid to the various parties in case No. 142228, in excess of the amount held in its hands under the contract with Heintz. The American Bonding Company and Heintz prosecuted error to the judgment rendered in the common pleas court, and it is claimed that there is error in the record to the prejudice of both plaintiff's in error.

The bonding company having been notified in the former action, No. 142228, and having also been a party to that action, although subsequently dismissed, and having been given an opportunity to make a defense in the case and having failed to do so, the court holds that the American Bonding Company is concluded and bound by that judgment and can not question the correctness thereof in this action.

This court in *Cincinnati v. Boston*, 7 Ohio App., 350, laid down the rule that a party being vouched in such a case is bound to appear and make a defense, and if he fails to do so he will be concluded and bound by the judgment. In support of this rule see *Bank v. Bank*, 68 Ohio St., 43; *Cincinnati v. Dieckmeier*, 31 Ohio St., 242, and numerous other authorities cited in the case of *Cincinnati v. Boston*, *supra*.

It is further claimed by the American Bonding Company that the board of education paid to the contractor Heintz \$8,000 in advance of the time when same was due under the contract, but the record discloses that this payment was made to Heintz upon the express written consent of the American Bonding Company, given before the money was paid to Heintz. And it further appears that the Board of Education refused to pay this sum to Heintz unless the bonding company would consent to the payment thereof. And it further appears that this \$8,000 paid to Heintz was paid out to the sub-contractors and materialmen upon the checks of Heintz, countersigned by the bonding company's agent, duly authorized in the premises.

Under such circumstances we hold that the American Bonding Company is estopped to complain of the payment of this money advanced to Heintz before it was due under the contract.

It is further claimed by the American Bonding Company that the board of education paid to the contractor Heintz from time to time moneys in excess of the amounts due him under the esti-

mates. The contract provided that payments were to be made to Heintz from time to time upon estimates made by the superintendent of the building for the board of education. The evidence discloses that these payments were made to Heintz from time to time upon estimates so made by the superintendent of the building. It appears that the superintendent was not overly careful in the making of his estimates, but no money was paid except under these estimates, and from these estimates twenty per cent. was retained until the completion of the contract.

There is no claim of any bad faith or that fraud was perpetrated, either upon Heintz or the bonding company; but it is claimed that the estimates exceeded the amount of money actually due as the work progressed. In the absence of any bad faith or fraud we hold that the American Bonding Company, the surety in this case, was not prejudiced by the fact that the estimates exceeded the amounts that should have been computed. It was well within the rights of the board of education to pay upon the estimates made by the superintendent of the building.

In the case of *Y. M. C. A. v. Gibson*, 58 Wash., 307, the court held that so long as the payments were made upon the estimates of the person who was to make the estimates, even though they were in excess of the amount the contractor was entitled to, in the absence of bad faith, the surety would be bound by these payments. See *Howard County v. Baker*, 119 Mo., 397.

We fail to see how the bonding company was prejudiced in any way by the payment of these moneys to the contractor. It was the obligation of the contractor to pay his materialmen and sub-contractors, and if he received the money from the board of education to pay them and failed to do so, the surety obligated itself to be liable in case the contractor failed to perform every term and condition of the contract.

So far as the record discloses, we find no errors therein prejudicial to the American Bonding Company.

As to the plaintiff in error Michael J. Heintz it appears that he filed an answer in which he set up that he had been adjudged a bankrupt and discharged therefrom, and that the board of education had notice thereof. The board of education in the court below, filed a reply to this answer setting up that the claim of the board of education against Heintz had not been scheduled

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in bankruptcy and that the claim was contingent and not provable in bankruptcy. While Heintz filed this pleading, when the case came on for trial he failed to appear, and he failed to offer any evidence in support of his claim that he had been adjudged a bankrupt. And in this state of the record we are unable to see how any error was committed prejudicial to him. In the absence of any proof, and with the denial of the averments of his answer by the board of education, the court was warranted in rendering a judgment against Heintz in the full amount.

For the reasons stated the judgment of the court below is affirmed.

Judgment affirmed.

JONES, P. J., and HAMILTON, J., concur.

APPROPRIATION FOR ROAD PURPOSES.

Court of Appeals for Fairfield County.

STEPHEN A. HOLTSEBERRY v. THE STATE OF OHIO EX REL. FRANK R. FAWVER, SUPERINTENDENT, PUBLIC WORKS OF OHIO.

Decided, September 24, 1918.

Roads—Appropriation of Land for—Verdict may be Returned by Three-Fourths of the Jury—Burden of Proof—Necessity and Purpose of the Appropriation Need not be Set Forth in the Certificate.

1. In an action for appropriation of land for road purposes, the burden of proving the value of the land sought to be taken is upon the property owner.
2. Error does not lie in such a case to failure of the certificate of appropriation to set forth the necessity of the appropriation or the purpose for which the land sought to be appropriated is to be used.

Augustus A. Mithoff, for plaintiff in error.

Joseph McGee, Attorney General; *John F. Kramer* and *J. H. Fultz*, Prosecuting Attorney, contra.

HOUCK, J.

This case is here on error from the judgment of the probate court of Fairfield county, Ohio. The parties here stand in the reverse order from where they stood in the lower court.

The plaintiff below brought suit to appropriate certain real estate belonging to the defendant below for road purposes. A jury returned a verdict for the plaintiff and allowed the defendant the sum of \$260 as compensation for the land so taken. A motion for a new trial was overruled and a judgment entered on the verdict.

Plaintiff in error seeks a reversal of this judgment for the following reasons:

1. The court erred in charging the jury that three-fourths of its number or more might return a verdict in the case.
2. Error of the court in its charge to the jury that the burden of proof as to the value of the land, sought to be taken, was upon the land owner.
3. Error in overruling motion of defendant below to dismiss the proceedings because the certificate of appropriation failed to state that it was necessary to appropriate the real estate in question, and further that said certificate failed to state the purpose for which the land sought to be appropriated was to be used.

As to the first claim of error this court has heretofore passed upon this question in the case of *F. B. Smith, et al. v. Carrie Craig, et al.*, 29 O. C. A., 236, the same being adverse to the claim of plaintiff in error.

As to the second and third grounds of alleged error, will say the suit in this case was brought under and by authority of and as a special proceeding, as authorized under Sections 442 to 450, General Code.

An examination of the record in this case clearly shows that each and every step necessary to be taken by the plaintiff below, as required by said sections of our statute, was fully carried out and the judgment of the lower court is clear and free from any prejudicial error in any way affecting the substantial rights of the plaintiff in error.

It therefore follows that the judgment of the probate court should be affirmed.

Judgment affirmed.

POWELL, J., and SHIELDS, J., concurring.

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**ACTIONS FOR RECOVERY OF UNLAWFUL PAYMENTS OF
PUBLIC MONEY.**

Court of Appeals for Hamilton County.

THE STATE, EX REL CAMPBELL, PROS. ATTY., V. BALLARD.

Decided, May 28, 1917.

*Public Funds—Actions for Recovery of Where Unlawfully Paid Out
—Report of Bureau of Inspection and Supervision—Application of
the Statute of Limitations.*

The special provisions of Section 286-3, General Code, that no cause of action on any matter set forth in any report made under authority and direction of Section 286, General Code, shall be deemed to have accrued until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and that all statutes of limitations otherwise applicable thereto shall not begin to run until the date of such filing, apply in a case founded upon a report filed after the taking effect of such provisions. This is true despite the fact that the illegal payments of public moneys were made before the enactment of Sections 286, 286-1, 286-2 and 286-3, General Code, not only created a new right, but also provided therein a new remedy for this new right, and that the statute of limitations against this cause of action to recover an illegal or unauthorized payment of public moneys should not begin to run until the filing of the report by the state officials.

John V. Campbell, Prosecuting Attorney, and Smith, Hickenlooper, Henry G. Hauck and Louis Capelle, Assistant Prosecuting Attorneys, for plaintiff in error.

Littleford, James, Ballard & Frost, contra.

GORMAN, J.

Heard on error.

In the court of common pleas a demurrer was filed to the petition of relator, on the grounds that the relator had no legal capacity to sue; that there was a defect in parties plaintiff; that the action was not brought within the time limited for the commencement of such actions; and that the petition did not state

facts sufficient to constitute a cause of action. The demurrer to the petition was sustained on the ground that the action was barred by the statute of limitations—the six-year statute—and the relator not desiring to plead further judgment was rendered in favor of defendant for costs.

The relator is in this court asking for a reversal of this judgment.

In his petition the relator sets out that the action was brought by the state of Ohio for the use and benefit of Hamilton county, in substance setting out that from January 1, 1908, to January 1, 1910, the defendant was the solicitor of the city of Cincinnati, and that during said period John M. Thomas, Jr., was one of the assistant city solicitors and was designated to act and was acting during said period as the prosecuting attorney of the police court of the city of Cincinnati; that the board of commissioners of Hamilton county appropriated each year during the said two years eight hundred dollars for the purpose of paying the salary of the police court prosecutor, without designating the name of the person to whom said money was to be paid; that the defendant Edward M. Ballard collected from Hamilton county on account of said appropriation the sum of \$1,399.94, in monthly installments, between May 7, 1908, and January 15, 1910, inclusive; that after the termination of the services of said Thomas he presented a claim to the commissioners of Hamilton county for the sum of \$1,400, with interest, on account of his services as prosecuting attorney of the police court, and claimed said sum as compensation for said services; that the claim was rejected, and upon the final hearing of the case in the Supreme Court of Ohio on January 20, 1914, said Thomas was awarded the full amount of the claim made by him, with interest. The petition further avers that on April 8, 1915, after said cause had been decided, the Bureau of Inspection and Supervision of Public Offices of the State of Ohio made a finding for the recovery of said moneys paid to said Ballard, and in such finding it was held that said Ballard should return to the treasury of Hamilton county said sum of \$1,399.94, with interest; that said Ballard refused to make a refunder of said sum

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or any part thereof; and that thereupon this action was brought to recover said sum.

The prosecuting attorney instituted this action by virtue of Section 2921 of the General Code, and Sections 286, 286-1, 286-2 and 286-3, General Code (103 Ohio Laws, 506, 507, 508 and 509).

Section 286, as amended May 3, 1913 (103 O. L., 507), provides that the report of the examination (made by the Bureau of Inspection and Supervision of Public Offices) shall set forth in such detail as may be deemed proper by the bureau, the result of the examination as to any public moneys which have been illegally drawn from the public treasury, or illegally expended, and shall be filed with the prosecutor of the proper county.

Section 286-1 provides that the civil action provided for in Section 286 may be heard and determined in any court having jurisdiction of the amount involved, and having jurisdiction to afford the remedy prayed for.

Section 286-3 provides that no cause of action on any matter set forth in any report made under authority and direction of Section 286, General Code, shall be deemed to have accrued until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and that all statutes of limitation otherwise applicable thereto shall not begin to run until the date of such filing.

By the provisions of Section 2921, General Code, it is made the duty of the prosecuting attorney to bring an action to recover any public moneys illegally drawn from the public treasury; and by the provisions of the sections just cited (286, 286-1, 286-2, and 286-3), it is also made his duty to commence an action for the recovery of moneys illegally withdrawn from the public treasury.

It would appear from the averments of the petition that such payment made to the defendant herein was on January 15, 1910, and if Sections 11222 and 11236, General Code, apply, then it would appear that the action was barred on January 15, 1916. This action was not commenced until April 27, 1916.

We are of the opinion, however, that the special provisions of the Code, Section 286-3, being applicable to claims of this character, would apply to this case, rather than Sections 11222 and 11236, above cited. It appears to us that the Legislature not only created a new right by Sections 286, 286-1, 286-2 and 286-3, but also provided therein that all statutes of limitations otherwise applicable thereto shall not begin to run until the date of the filing of the report by the Bureau of Inspection and Supervision of Public Offices. In other words, they provided a new remedy for this new right, and also that the statute of limitations against this cause of action to recover the illegal or unauthorized payment of public moneys should not begin to run until the filing of the report by the state officials. This report having been filed on April 8, 1915, if we are correct in our conclusion, there would be no bar to the action until the 8th of April, 1921.

There is no vested right to a remedy in favor of anybody. The Legislature may, if it sees fit, amend, repeal or alter any section of the General Code relating to the remedy, but this they can not do so as to affect pending actions unless it is specifically so provided. Section 26, General Code, prohibits the Legislature from passing any act or amending any statute which affects the remedy so as to make it applicable to pending actions, unless the act specifically provides that it shall apply to pending actions. But at the time Sections 286, 286-1, 286-2 and 286-3 were enacted by the Legislature this suit was not pending, and therefore the inhibition of Section 26, General Code, can not apply.

There is no doubt that statutes limiting the time within which actions may be brought are statutes of repose, and relate to the remedy only. It is unnecessary to recite authorities in support of this plain proposition. And it was held in *Elder v. Shoffstall*, 90 Ohio St., 265, quoting from the language of the court on page 274:

"In view of the plain and positive provisions of the law, it follows that causes of action, prosecutions or proceedings existing at the time of the amendment or repeal of statutes relating

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to the remedy are not exempt from the operation of such amendment or repeal."

So that if we treat Sections 286, 286-1, 286-2 and 286-3 as amendments to Sections 11222 and 11236, these amendments, nevertheless, being applicable only to the remedy and not affecting the cause of action, can not be invoked to bar an action which was not commenced at the time these sections were passed. The cause of action existed, but the cause of action was not affected by these amendments, and under the provisions of Section 26, General Code, there is no reason why the statutes may not be amended or repealed so long as they do not affect pending actions, and do not affect causes of action, unless particularly specified.

But Sections 286, 286-1, 286-2 and 286-3 are not to be considered as amendments to Sections 11222 and 11236, but are really new legislation, and, under the decision of *W. & L. E. Rd. Co. v. Toledo Ry. & Term. Co.*, 72 Ohio St., 368, it has been held that Section 26, General Code, does not apply to new legislation.

It is claimed by counsel for defendant in error that the statute of limitations which governs this action is one which was in force at the time the cause of action accrued, to-wit, January 15, 1910. But as we have stated, this cause of action, which is a new one in favor of the state, did not accrue until the state officials had filed their report with the prosecuting attorney.

Numerous authorities are cited by counsel for defendant in error in support of his contention that Section 11236, General Code, applies to this action. But an examination of the history of this legislation will disclose that this section was originally Section 4974, Revised Statutes, and was repealed when the Legislature passed the General Code, February 14, 1910. Section 11236 was then substituted for Section 4974, Revised Statutes. Section 4974, Revised Statutes, contains the provision that the statute of limitations in force when the action accrued shall be applicable to such cases according to the subject of the action and without regard to the form. The Legislature in repealing Section 4974, Revised Statutes, and substituting therefor Sec-

tion 11236, General Code, omitted this provision entirely from the code. So that the decisions cited by counsel for defendant in error, in support of his contention that Section 4974, Revised Statutes, applies to this action, were all rendered at the time when Section 4974, Revised Statutes, was in full force and effect. We are unable to see anything in the provisions of Section 4974, Revised Statutes, as amended, Section 11236, General Code, or in Section 26, General Code, which would preclude the Legislature from providing separate legislation for the creation of the new right and new remedy in favor of the public against any person who received any money illegally from the public treasury.

Such being the conclusion of the court, we hold that the common pleas court erred in sustaining the demurrer to the petition, and the judgment is therefore reversed.

Judgment reversed.

JONES, P. J., and HAMILTON, J., concur.

AN EXECUTOR MAY QUIET TITLE.

Court of Appeals for Belmont County.

MITCHELL, EXR., v. THE CITY OF BRIDGEPORT.

Decided, December 11, 1917.

*Title—Action to Quiet May Be Maintained by an Executor, When—
Heirs of Testator Not Necessary Parties.*

Where the will directs the executor to sell the real estate of the testator, and empowers him to make deeds therefor to purchasers, such executor may maintain an action to quiet the title to such real estate against a person claiming an adverse interest therein, and it is not necessary that the heirs of the testator be made parties thereto.

James C. Tallman and Gordon D. Kinder, for plaintiff in error.

Fred Spriggs, contra.

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METCALFE, J.

Heard on error.

The question in this case is raised by the demurrer to the petition. It is averred in the petition that the plaintiff is the executor of the will of Josephine K. Mitchell; that by the terms of said will he was directed to sell the real estate of the testatrix and to make deeds for the same and convey the title thereto to the purchaser; that the real estate in question was a part of the estate of said testatrix; and that the defendant claims an adverse interest therein.

It is urged by the defendant in error that the direction in the will to the plaintiff as such executor to sell the real estate and convey the title thereto to the purchaser, does not give him the right to maintain an action to quiet title, but that to entitle him to maintain such action it is necessary to aver and prove both legal title and actual possession.

Under former legislation it is undoubtedly true that the plaintiff in an action to quiet title would have to aver and prove both legal title and actual possession. *Thomas v. White*, 2 Ohio St., 540; *Douglass v. Scott*, 5 Ohio, 194; *Harvey v. Eaton*, 1 Dis., 65, and *Chamberlain v. Marshall*, 8 Fed. Rep., 398.

The statute then in force (29 O. L., 81) provided that "Any person having the legal title and possession of land may file a petition against any other person setting up a claim thereto."

In *Hubbard v. Clark*, 8 Ohio, 382, Judge Hitchcock, delivering the opinion of the court, says at page 385:

"By this section of law a complainant, in order to sustain his bill, must show that he is vested not only with a legal title, but with the *actual possession* of the land in controversy."

This was the unquestioned law of the state until 1893—at which time the section above quoted appeared in the Revised Statutes as Section 5779, in substantially the words of the original enactment. The Legislature in 1893 (90 O. L., 226) amended Section 5779, Revised Statutes, as follows:

"An action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims

an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

This is substantially identical with the language of Section 11901, General Code.

Under the law as it now stands it is plain that an averment of legal title in the plaintiff is unnecessary. Is it also unnecessary in such an action by an executor, where he is directed by the will to sell the land of the testator and convey the title thereto to the purchaser, to aver actual possession?

We are of the opinion that such an averment is unnecessary. In *Dabney v. Manning*, 3 Ohio, 321, it is held that power given to an executor by the will to sell the testator's land and distribute the proceeds among the heirs is a power connected with a trust, and entitles the executor to the possession of the land. In *Lessee of Williams v. Veach*, 17 Ohio, 171, the question again came to the same court, and, on page 183, the court say:

"It seems to the court, that taking the whole will together, it furnishes a strong case, of a power conferred by will upon executors to sell real estate, and that this power is coupled with an interest. A much stronger case, in fact, than the case of *Dabney v. Manning*, 3 Ohio R., 321; and upon careful examination we are brought to the conclusion that the court did not err in instructing the jury, that by force of the will of John Kidd the premises in controversy were vested in fee simple in his executors, and did not descend to his heirs."

In *Elstner v. Fife*, 32 Ohio St., 358, it is held that where a testator makes no other disposition of his property except to direct that it shall be sold by his executors and the proceeds paid to a trustee for the benefit of certain legatees, the right of possession passes with the will to the executors to enable them to effect the object of the testator. See also *Roberts, Admr., v. St. Bernard*, 8 C. C. (N. S.), 422, 29 C. C., 725; *Lessee of Boyd v. Talbert*, 12 Ohio, 212, and *Barkman v. Hain*, 5 N. P.,

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508. These decisions settle the question of the right of the executor to the possession of the land. Whether or not he must aver actual possession to enable him to maintain an action to quiet title has not been determined by the Supreme Court of Ohio.

But in *Sears v. Scranton Trust Co.*, 77 Atl. Rep., 423 (228 Pa. St., 126), the exact question came before the Supreme Court of Pennsylvania, and in that case the court held:

“The direction to an executor to sell the decedent’s property and pay the proceeds to the widow gives the executor full power over the realty, and the right to maintain any action necessary to carry out the directions and protect the interests charged, including the power to maintain a bill to remove a cloud on the title.”

On page 426 the court say:

“The direction to the executor to sell the decedent’s property and pay the proceeds to the widow worked a conversion, and gave the executor full power and authority over the real estate, with the right to maintain any action at law or in equity which might be necessary to carry out the direction and to protect the interests with which it was charged.”

And, again, on the same page:

“While it is true that ordinarily a personal representative has not the right to maintain a bill or an action concerning the real estate of his decedent, the case is different where an executor is given an interest in the real estate such as under the present will. In a case like this where the executor is practically constituted a trustee of the real estate, and is directed to sell in order to effect a conversion, if a cloud exists upon the title, it is his right and duty to do all in his power to have the cloud removed so that he may more advantageously carry out the direction to sell.”

In *Lafferty v. Sexton & Son*, 41 Ia., 435, it is held:

“Where the possession and control of real estate is given to the executors for the purpose of carrying out the provisions of the will, they are authorized to maintain an action to quiet the title thereto.”

See also *Smith, Exr., v. Stiles*, 68 Wash., 345, 123 Pac. Rep., 448; *Pennie v. Hildredth*, 81 Cal., 127, 22 Pac. Rep., 398; *Quinton v. Neville*, 152 Fed. Rep., 879; *Dundas's Appeal*, 64 Pa. St., 325, and *McClure's Appeal*, 72 Pa. St., 414.

A consideration of these cases seems to indicate that where a testator has directed his executor to sell the lands for the purpose of carrying out the provisions of his will, such direction works a conversion of the property and carries with it the title and possession necessary to enable him to maintain any action which may be necessary to carry out the provisions of a will, including an action to quiet title.

Judgment reversed.

POLLOCK and FARR, JJ., concur.

JURISDICTION TO MODIFY A DECREE.

Court of Appeals for Licking County.

THE NEWARK NATURAL GAS & FUEL COMPANY V. THE CITY OF
NEWARK, OHIO, AND OTHERS.

Decided, October Term, 1918.

Gas Company Required by Mandatory Order of Court of Appeals to Adhere to Rates Fixed in the Ordinance—But With Privilege of Applying for a Modification of the Rates Should Circumstances so Require—Jurisdiction Over Such an Application—Nature of the Proceeding.

1. A petition for modification of a decree and finding by the court of appeals, provision for a modification should it be shown to be necessary being found in the decree, is not an original and independent action, but rather an additional proceeding in the original action, and is not appealable.
2. Moreover, if such a proceeding were to be treated as an original and independent action, then it would in the case at bar become an

* For opinion below see, *Newark Natural Gas Co. v. City of Newark*, 22 N.P(N.S.), ———.

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action for money and not a chancery case, and would not be appealable for that reason.

S. M. Douglass and J. R. Fitzgibbon, for plaintiff.

Henry C. Ashcraft, Frank A. Bolton and Edward Kibler, Sr., contra.

POWELL, J.

This action is before this court by appeal from the judgment of the court of common pleas.

A motion has been filed to dismiss the appeal and the case is presented to us on this motion and the briefs of counsel.

This is the second case between the parties to this proceeding, the first having been commenced in March, 1911. The original case was an action for mandatory injunction to compel plaintiff to comply with the ordinance of March 6, 1911, fixing a rate for the sale of gas to the inhabitants of Newark and to the city itself. The defendant, Metz, was appointed receiver in the original case by agreement of parties; his duties were to collect and keep until final order was made the amount of the difference between the original franchise rate allowed to the plaintiff and under which it was supplying gas to the city, and the rate under the ordinance of March 6, 1911. In that case judgment was given to the city as prayed for, both in the court of common pleas and in the court of appeals, on appeal to that court. The latter judgment was affirmed in the Supreme Court of Ohio and later by the Supreme Court of the United States. It was finally determined on the 8th day of January, 1917.

The judgment in the original case, as entered in the court of appeals, contained a provision as follows:

“This finding and decree of the court is made, however, without prejudice to the right of defendant company at any time to apply to a court of competent jurisdiction to modify said finding, if at any time it should appear that said rate of eighteen cents net does not render an adequate return to said defendant company.”

The petition in the present case is based upon this reservation or exception in the judgment of the court rendered in the orig-

inal action, together with such averments as show that plaintiff was entitled to recover the proportionate amount due for the time covered by the rate of March 6, 1911, to the time when settlement was made between the parties by an agreement upon the rate between the city and the said plaintiff. The amount claimed is \$29,434.63.

A hearing was had upon the issue joined in the present case resulting in an order dismissing the petition on the ground, first: that the court of common pleas was without jurisdiction to entertain the action; and second: that the proof was insufficient to sustain the averments of the petition. An appeal was taken from the judgment of the court of common pleas to this court.

After an extended and somewhat careful examination of the record in this case this court is of the opinion that the motion to dismiss the appeal herein should be sustained.

First: This is not an original and independent action, but is an "additional proceeding in the original action." It is not an action to impeach the judgment in the original action for fraud, but is one to modify or vacate a proportionate part of that judgment by reason of a changed condition of fact. The right to maintain such proceedings was reserved in the original judgment as well as authorized by statute. Section 11631 General Code.

That the petition and summons did not make a new action see *Misner v. Misner*, 41 Ohio State, 678.

Additional proceedings in an original action are not appealable. *Taylor v. Fitch*, 12 Ohio State, 169.

One appeal has already been had in the original action.

Second: If this case can be regarded as an original and independent action, then it was commenced in the wrong court. The judgment sought to be vacated or modified was recovered in the court of appeals of this county in an action pending in said court on appeal from the court of common pleas. This action was commenced in the court of common pleas to modify the judgment of the court of appeals.

We think the court of common pleas is without jurisdiction

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to vacate or modify the judgment of the court of appeals. The petition pleads a continuing order and thereby avoids the effect of an answer of *res adjudicata*, but an action based on a continuing order is not an original and independent action, nor is it "the civil action" of the code, but is incidental to and part of the original action and is not appealable.

Third: If this action is original and independent, it is an action for money only, and not in chancery, and for this additional reason is not appealable.

Upon the grounds stated, the appeal will be dismissed.

HOUCK, J., and SHIELDS, J., concur.

SELECTION OF SITES FOR SCHOOL HOUSES.

Court of Appeals for Clinton County.

STATE, EX REL. CLARKE ET AL, V. JEFFERSON TP. RURAL SCHOOL DIST. (BD. OF ED.).

Decided, May 26, 1919.

Schools—Discretion of Board of Education in Choice of School Sites—Recital in Resolution for Bond Issue—Not a Bar to Change of Location.

1. Section 7620, G. C., vests in boards of education the power to select school sites; and in the absence of abuse of discretion, fraud or collusion, the exercise of such power will not be interfered with by a reviewing court.
2. The recital in a resolution of a board of education of a rural school district that a certain village was the most suitable locality for a school site, and the representations made by such board at the time a bond issue was submitted to the electors, can not limit the power of such board to later exercise its discretion and change the location of the site to meet the then needs of the school district.

Smith, Rogers & Smith, for plaintiff in error.

E. J. West and *G. P. Thorpe*, for defendant in error.

SHOHL, J.

Heard on error.

The relators filed an action praying for a writ of mandamus commanding the board of education to proceed at once to enter into a contract for the erection and construction of a schoolhouse at Westboro, for centralizing there the schools of said township rural district, and further praying that the board be enjoined from constructing the schoolhouse at any other point. A demurrer to the petition having been sustained, and judgment entered dismissing the petition, the relators prosecute error to this court.

The petition alleges that in 1915 an election was held in Jefferson township, Clinton county, resulting in a majority vote in favor of centralizing the schools of the township district at Westboro, the Westboro Rural School District having previously been dismissing the petition, the relators prosecute error to this court. District.

Thereafter, the board of education duly determined that it was necessary to build, furnish and equip a new house for the centralized schools of said district. And it was the sense of the board that the most suitable, practical and desirable location for said building was in the village of Westboro.

The board then authorized a bond issue of \$36,000 which was approved at an election which was held for that purpose in accordance with Section 7625, General Code. It is charged that the board then formed a plan and conspiracy to defeat the wishes and desires of the electors and taxpayers and arbitrarily refused to proceed with the erection of the building.

In August, 1916, the board employed architects to prepare drawings, specifications and details for a schoolhouse to be erected at Westboro. Thereafter, one of the members of the board moved from the district, and, the remaining members being unable to agree upon his successor, the county commissioners of Clinton county appointed his successor. The board as then constituted "conspired" with the Board of Education of Midland City Village School District and the County Board of Education, and in October, 1916, the County Board of Education transferred the Midland district in its entirety to the Jefferson Township (Rural School) District, and thereby destroyed the Jef-

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person township district as centralized. The present township school district now uses as an excuse these facts and the claim that the necessities of the present situation require a different location for the new building. It plans to build elsewhere than at Westboro, which is the most suitable location.

Relators charge that the various acts are part of a conspiracy to perpetrate a fraud on the electors and are done arbitrarily and without justification or reason therefor.

It is plain from the foregoing that there is a radical difference of opinion between the relators and the members of the board of education. The court can not control the discretion vested in the board of education, nor substitute its judgment for that of the board upon any question it is authorized by law to determine. In the absence of abuse of discretion or fraud or collusion, the court will not restrain the board from carrying into effect its determination of any question within its discretion. *Brannon v. Tiro Consolidated School District of Crawford Co. (Bd. of Ed.)* 99 Ohio St., 369; *Pugh Printing Co. v. Yeatman*, 22 C. C., 584, and *Wood Co. (Comrs.) v. Pargillis*, 10 C. C., 376.

The allegations of conspiracy and fraud are mere epithets and are not averments of issuable facts. Denunciation of the motives and actions of the members of the board may show the opinion or conclusion of the pleader, but it is of no legal significance on the question of validity. *State v. Ironton Gas Co.*, 37 Ohio St., 45, 49. No illegal act was done and no illegal purpose shown.

The board owed a duty to exercise its discretion and use its best judgment with due regard to the peculiar circumstances, wants, and interests of the district. *State v. McCann*, 21 Ohio St., 198, 201. It should consider the conditions and circumstances at the time of the action, and the protest or wishes of the people will not control. *State v. Chester Twp. Cen. School Dist. of Clinton Co. Bd. of Ed.*, 1 C. C. (N. S.), 486, and *Wayne Twp. Champaign Co. (Bd. of Ed.) v. Shaul*, 4 N. P. (N. S.), 433, 443, 444.

Neither the resolution that it was the sense of the board that the most suitable location was at Westboro, nor represen-

tations made at the time the bond issue was authorized, can limit the power of that body to exercise its discretion. *Rogers v. Cincinnati*, 10 Ohio App., 238.

We need not consider the power of the board to reconsider its action in fixing a site, but we have not overlooked the reference to that in the case of *State v. Chester Twp. Cen. School Dist. of Clinton Co. (Bd. of Ed.)*, *supra*.

At the time of the action adjudicated in *Moss v. Special School Dist. No. 1 of Huntsburg Twp. of Geauga Co. (Bd. of Ed.)* 58 Ohio St. 354, cited by plaintiff in error, Secs 3941 and 3941a, Rev. Stat., now repealed, made it the duty of the board to purchase the site designated by the commission appointed by the probate judge. The General Code now vests in the board the power to select the site. Section 7620 G. C. and *State v. Chester Twp. Cen. Sch. Dist. of Clinton Co. (Bd. of Ed.)*, *supra*. Furthermore, the designation of "Westboro" did not constitute the fixing of a site in the absence of the exact designation of the lot or land.

The facts shown by the petition did not render the duties of board ministerial. The final determination of the location of the school building is still within the discretion of the defendants.

Judgment affirmed.

HAMILTON and CUSHING, JJ., concur.

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CARE IN THE OPERATION OF STREET CARS.

Court of Appeals for Cuyahoga County.

CLEVELAND RY. v. LEIS.

Decided, July, 1919.

Municipal Corporations—Ordinances Providing Degree of Care to be Exercised by Motormen in Operating Their Cars—Declared Void for Uncertainty—And Because Providing a Different Degree of Care from that Established by General Law.

An ordinance of the city of Cleveland provided that motormen in charge of cars should exercise "all possible care and vigilance" on approaching any other car that is stopped for the purpose of receiving or letting off passengers. Another and similar ordinance provided that any car approaching another car which has been stopped for any purpose, and any car operating around a curve, should do so "with the greatest care" and under "complete control."

Held: That such ordinances are not authorized by the provisions of Article XVIII, Section 3, of the Constitution of Ohio, and are unconstitutional and void in that they are indefinite, uncertain and incapable of definition, and in that they establish a new and different degree of care from that established by the general law of the land.

Squire, Sanders & Dempsey, for plaintiff in error.

Payer, Winch, Minshall & Karsh, for defendant in error.

VICKERY, J.

Heard on error.

This action is brought into this court to reverse a judgment rendered in the Common Pleas Court of Cuyahoga County against the Cleveland Railway in favor of Josephine Leis, and to accomplish this result the railway company urges in oral argument two reasons why said judgment should not be allowed to stand:

1. The verdict is not sustained by sufficient evidence.
2. Because of the admission of certain ordinances in evidence.

From the way we view the situation these two reasons may be discussed and disposed of together, because a close reading of the record will disclose this fact: that if the ordinances had not been introduced and permitted to go to the jury the verdict could not have been sustained, or the jury might have reached a different conclusion, because there would have been no evidence in the record of any negligence of the railway company.

It seems that Josephine Leis, the plaintiff below, whom hereafter we shall call plaintiff, was a passenger on one of defendant's cars going south on Broadway, and at Hinde street the car stopped to let off passengers at the proper or south crosswalk of Hinde street; that plaintiff apparently lived on Hinde street and had to cross both the southbound and the northbound railroad tracks in order to reach her home; that at the time the car from which she alighted stopped, automobiles going in the same direction, south on Broadway, also stopped, as under the law they are required to do, and a truck following the street car upon which she was riding stopped behind the car from which plaintiff alighted; that after plaintiff alighted, instead of standing until the car from which she alighted had started forward, she immediately walked back toward the end of the car (the car being a center entrance type) to go around behind it; and that as she passed around the rear of said car she was immediately struck by a northbound car and injured, as claimed, for which she obtained a verdict.

This recital will show that she had ceased to be a passenger and the railway company owed her the duty of just ordinary care, and that she herself must exercise that same degree of care for her own safety. We think the law well settled that where a pedestrian goes around behind a car standing on the street, on to another track, he can do so only by exercising ordinary care, such as people under similar circumstances usually exercise, and this required plaintiff, in the exercise of ordinary care in the existing situation, to look around and ahead of the object she was about to pass, and at a time and in a manner where the looking would be effective, and, if it were not for the city ordinances introduced in this case, we fail to see in the record evi-

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dence of such negligence of the defendant as would warrant a verdict. Indeed, if the record did not show that, she herself was not free from negligence which contributed to her own injury; hence it becomes of the utmost importance whether or not it was proper to introduce the ordinances, and, if so, whether the ordinances themselves are valid or not.

That part of one of the ordinances, so far as is germane to the question at issue, is as follows:

“Every motorman or other person or persons having the charge or control of any motor or other car being operated upon any track of any street railroad in the city of Cleveland, shall exercise all possible care and vigilance on approaching any other car that is stopped for the purpose of receiving or letting off a passenger or passengers.”

The other ordinance is as follows:

“Any car approaching another car which has been stopped for any purpose, and any car operating around a curve, shall do so with the greatest care and shall be under complete control.”

The objectionable part of the first ordinance quoted is all possible care and vigilance, and, of the second, the greatest care and under complete control.

It is claimed that these ordinances create a new and different kind of care than has ever been recognized or is now recognized in the general law of the land. In our opinion these ordinances are invalid, because the words are so indefinite and uncertain that no one would be able to know whether he were violating the ordinances or not.

What is meant by “all possible care and vigilance”? Is it that degree of care that a common carrier owes to its passengers? Nay, does it not call for even a higher degree of care than has hitherto been recognized by the authorities? How should these words be defined? We have already pointed out that the plaintiff had ceased to be a passenger, and the railway company owed her only the same duty that it owed to other pedestrians on the streets, which is ordinary care, to be con-

sidered with reference to the particular circumstances of each particular case, and the duty of the plaintiff was reciprocal and she was in duty bound to exercise the same degree, *i. e.*, ordinary care, for her own safety. The effects of the ordinance would be to sever the reciprocal relations and duties of the parties.

Again, what is meant by having the car "under complete control"? Must it be under such control that it can be stopped in one inch, or one foot, or ten feet; or when is it under complete control?

Again, shall operate said car "with the greatest care." What does that mean? It is argued that in *Schell v. DuBois*, 94 Ohio St., 93, an ordinance of the city of Bellaire, which provided that no one should operate an automobile in said city at a speed greater than the rate of speed that is specified in the statute, was held valid, and that if that ordinance was held valid so the one at bar must be; but this does not follow. The Bellaire ordinance declared a rate of speed which was within the power of any one to ascertain, and it was definite and certain. It is argued again that an ordinance, said to have been much more drastic than the ordinance here, requiring one to stop a car under certain circumstances, has been sustained; but again that does not meet the objection to the ordinance in the case at bar, for there the requirements were easy to determine, and one would know whether he was violating the ordinance or not, but here, in the case at bar, all is left to conjecture. If the doctrine established in *Schell v. DuBois*, *supra*, which is in effect that whenever an ordinance or law has been violated it is negligence "*per se*," and if that is the proximate cause of the injury then recovery may be had; if, as I say, this is the law, it becomes doubly important that the ordinance define in no uncertain manner the things the doing or not doing of which would result in making a party guilty of negligence, so that one may know definitely what he must do or what he must not do, and we think the sections of these ordinances are void for indefiniteness and uncertainty of definition. Indeed, the learned trial judge apparently had his troubles, and tried to qualify the ordinance by adding something which was not in the ordinance, namely,

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that "they are to exercise all possible care and vigilance which is to be used with the practical operation of a street car line" Where did the learned judge get this authority for this qualification? He practically used the words of courts in defining the highest degree of care in passenger cases; but this was not a passenger case. He submitted to the jury the evidence, and then undertook to qualify it. If the ordinances were proper to be in evidence, then as to whether their terms had been violated or not was for the jury, and if they should think in a case that the car should have been under such complete control of the motorman that it could be stopped instantly, and was not, then under 94 Ohio State it was negligence *per se*. This would be a very dangerous doctrine to establish.

A more critical, or perhaps hypercritical, jury might have come to the conclusion that in this case it was the duty, in the exercise of all possible care and vigilance, for the railway company to send a man on ahead to warn off pedestrians, and there would be no end to the things which a jury might find that the railway company should do to carry out the terms of the ordinance, remembering all the while that a failure in any respect would make the railway company guilty of negligence *per se*!

Such drastic legislation either by the State Legislature or by the city council must be scanned very closely and denied, unless clearly authorized by the law. We hold, therefore, that the rule of negligence established by this ordinance, which applies to street railroads only, is a new and different one than is established by the general law of the land, and is a violation of Article XVIII, Section 3 of the Constitution of Ohio, which provides that municipalities shall have authority to exercise all power of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws. The rule of negligence and the law governing the same are general, and the law of negligence is a general law. 20 Ruling Case Law, Sections 1 and 2 are as follows:

" 'Negligence' is the word ordinarily used in common law terminology to express the foundation of civil liability for in-

jury to person or property, when such injury is not the result of premeditation and formed intention."

"Negligence as the term is used in the law is a recognized ground of legal liability. Every person in the conduct of his affairs is under a legal duty to act with care and forethought; and if injury results to another from his failure so to do, he may be held accountable in an action at law."

Thus the law establishes the doctrine of negligence, and is general in its nature and surely must be regarded a part of the great body of general law, and under the home-rule amendment, whether a city had adopted a charter or not, it was not contemplated that a municipality might change the law of negligence, and I can not agree with counsel for plaintiff that general laws refers only to statutory law. Surely the great body of common law, much of which has not been codified, is as much a part of the general law of the land as that part which has been codified. Our courts are daily engaged in administering that part of our jurisprudence as a part of the general law of the land. The law of negligence has not been codified; neither has the law of partnership. Suppose the city council would undertake, under their home-rule powers, to change the rule as to what should constitute a partnership. For example, suppose council should see fit to say that "he who shares in the profits of a concern shall be liable as a partner," going back, if you please, to the rule laid down in *Waugh v. Carver*, 2 H., Bl. 235, 14 R. R., 845, which formerly governed the law of partnerships. Could anybody claim that the council would have the power to overrule the law as laid down in *Harvey v. Childs & Potter*, 28 Ohio St., 319, which established a new and different rule, and which is now the recognized rule in partnerships all the land over? Surely not. Counsel for plaintiff assert several times in their briefs that general laws do not include rules of common law, but nowhere cite authority in point to sustain their contention. The case of *American Woodenware Mfg. Co. v. Schorling*, 96 Ohio St., 305, cited in their brief, is not a case in point. Neither is *Fitzgerald v. Cleveland*, 88 Ohio St., 338.

I am somewhat familiar with most of the law laid down in the cases which construe and pass on the power of Cleveland to

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legislate and do things under its charter, for almost all of the cases when tried in the *nisi prius* court, where the questions were first raised, were heard by me when a *nisi prius* judge, and even if the words "general laws" as used in Article XVIII, Section 3 of the Constitution, should have meant statutory laws, under its whole scope and power as finally adopted the home-rule amendment is limited to local matters.

There were two different parties on this proposition in the constitutional convention, the radicals and the conservatives. The radicals by means of the charter city were in favor of establishing a small state within the state, giving it absolute control; the other, in favor of giving it control over purely local matters. The debates in the constitutional convention on pages 1433 to 1498 and 1860 to 1869 throw much light upon the scope that it was intended to confer upon cities under the home-rule amendment.

Judge Rockel, a member of the constitutional convention from Clark County, in a recent article, has thrown some light on what was meant by the convention in adopting the home-rule amendment. After reciting the provisions relating to cities under the Constitution of 1851 he makes this statement:

"It was early agreed that the widest possible powers should be reserved for the municipality, that could consistently be done. Of course it should not have a power that was not properly within the domain of the municipality.

"It was thought that the words 'local self-government' would include generally the character of the power reserved to the municipality, but it was at once seen that all matters pertaining to 'local self-government' could not rest alone in the municipality, without destroying the sovereignty of the state.

"The original draft stated the exception to be that 'all such charters shall be subject to the general laws of the state, except in "municipal affairs." ' This language was no doubt adopted from the Constitution of the state of California. An examination, however, of the construction placed upon this exception was so diverse among the Californian courts, that it was decided not to use it, and instead there was substituted the words 'affecting the welfare of the state as a whole.' This was a distinct recognition of the general power of the state.

"The original Cleveland draft gave to municipalities the

'power to enact and enforce within their limits such police, sanitary and other regulations as are not in conflict with general laws.' This likewise was thought too broad in that the police power was without limit, other than it must be such as could be enforced within the limits of the corporation. The word 'local' was inserted before the word 'police' and when this was done it was decided that the phrase 'affecting the welfare of the state as a whole' was superfluous, and it was stricken out, as it was considered as being included in the words 'general laws.' This was done in the convention at the suggestion of a 'Home Ruler.'

"The committee felt, no doubt, that it could not in a more definite way draw the line between the powers that the city and the state might respectively have, than was done. Where home rule had been tried in other states, the courts were compelled to construe and define what was included in the organic law, and this would necessarily follow here on the proposed amendment.

"The Supreme Court, in the several decisions made, have, we think, carried into effect the intention of the framers. Johnson, J., in *Billings v. Cleveland Ry.*, 92 Ohio St., 478, 485, well states the relation of a self-chartered municipality when he says:

" 'There is no "*imperium in imperio*," except in the sense that by the approval of the state the city exercises part of the sovereign power under the limitations imposed, and may thereby, subject to such limitations, exercise all the powers of local self-government. * * * The charter becomes the organic law of the municipality as such local powers are concerned. But the authority of the state is supreme over the municipality and its citizens as to every matter and every relationship not embraced in the field of local self-government.' "

It will be seen, then, that it was not thought for a moment that to confer local self-government upon a city, either chartered or unchartered, would give it the power to alter by ordinance a well-established rule of negligence and substitute therefor, so far as the street railroad alone is concerned, a different rule both of care and of negligence, for they are resultant terms.

We therefore are of the opinion that it was wrong to admit these ordinances for the reason that the same are indefinite and uncertain, incapable of definition, and establish a new and different degree of care, which was beyond the power of the city council to do.

The ordinances are, therefore, invalid, so far as these pro-

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visions are concerned, and the case must, therefore, be reversed and remanded to the court of common pleas for further trial.

Judgment reversed, and cause remanded.

DUNLAP, P. J., concurring.

I concur in this judgment of reversal because I believe the council of the city of Cleveland was never authorized by the Constitution of Ohio to pass these ordinances. The provision of the constitution, that "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws," does not, in my opinion, authorize the passage of an ordinance which substitutes for well-settled principles of the common law, of wide and universal application, a different rule of conduct, upon the theory that it is an exercise of local self-government, or is a local police, sanitary or other similar regulation.

WASHBURN, J., concurring.

I concur in the reversal of the judgment in this case on the ground that though conceding under the decisions of the supreme court that the municipality under its home-rule charter had the right in the exercise of its police power to pass the ordinances in question, still such ordinances being general and indefinite in their wording, not requiring any definite and particular act to be done for the safety of the public, and their effect being only to change the common-law rule of negligence in a matter not purely local, are not admissible in evidence as having the force and effect of a law passed by the legislature. Such ordinances, which on their face attempt only to change in general terms the common law, are not to be measured by the same standard as a statute of the state; they should require definite and certain things to be done in order to have the force and effect of an act of the legislature and be admissible as a predicate of an act of negligence.

**PROOF AS TO KNOWLEDGE THAT GOODS RECEIVED
WERE STOLEN.**

Court of Appeals for Hamilton County.

MORRIS v. THE STATE OF OHIO.

Decided, May 21, 1917.

Criminal Law—Guilty Knowledge a Necessary Element—In Prosecution for Receiving Stolen Goods—Competency of Evidence of Previous Acts of the Same Character.

In cases involving fraud in the receiving of stolen goods, *scienter* is a necessary element to be established in order to fasten guilt upon the accused, and in such cases evidence of previous transactions which necessarily involve guilty knowledge by the defendant with reference to the transaction in question is admissible.

Schmuck & Jacobs, for plaintiff in error.

Simon Ross, Jr., Assistant Prosecuting Attorney, for defendant in error.

GORMAN, J.

Heard on error.

Plaintiff in error, Frank Morris, was jointly indicted with one Sam Cumins, and Julius Khourt, on two counts, one for grand larceny in which he was charged with having stolen and carried away forty-three pairs of shoes of the value of \$145.85, personal property of the Baltimore & Ohio Southwestern Railroad Company; and in the other he was charged with having received these shoes as stolen goods, knowing them to have been stolen.

Plaintiff in error elected to be tried separately, and upon being tried was found guilty of grand larceny in that the value of the goods stolen was assessed at more than thirty-five dollars. He was then given an indeterminate sentence in the Ohio penitentiary.

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It is claimed that there was error in the trial of the cause below in this: first, that the evidence fails to establish that the shoes were stolen. An examination of the bill of exceptions and the evidence adduced at the trial fully satisfies us that the jury were warranted in finding the plaintiff in error guilty as charged in the first count of the indictment. The verdict is not manifestly against the weight of the evidence, but, on the contrary, the accused having failed to take the stand and testify or explain how he came to be in possession of the goods that were shown to have been stolen, we think the jury had abundance of evidence upon which to base the verdict.

Secondly, it is claimed that the court erred in permitting one of the accused, Sam Cummins, who was jointly indicted with Frank Morris, to testify as to transactions between himself and Morris relating to former thefts in which Morris had sold stolen goods to said Cummins. Under the count of the indictment charging Morris with having received stolen goods it was proper to show *scienter* or knowledge on the part of Morris that the goods he had in his possession were stolen. It is a well known rule of law that in cases involving fraud in receiving stolen goods, *scienter* is a necessary element to be established in order to fasten guilt upon the accused. In the case of *Coblentz v. State*, 84 Ohio St., 235, this rule was laid down:

“On the trial under such an indictment evidence of previous transactions which necessarily involve guilty knowledge by the defendant with reference to the transaction in question is admissible, but as to transactions occurring subsequent to that on which the indictment is based evidence is not admissible.”

In the case of *Tarbox v. State*, 38 Ohio St., 581, the court said at page 584:

“The decisions are uniform to the effect that, where *scienter* is an element of the crime charged, previous offenses, necessarily involving such guilty knowledge, are admissible.”

In *State v. Reineke*, 89 Ohio St., 390, the rule laid down in the cases above cited is approved and followed.

It appears, therefore, that the state was well within its rights when it undertook to show and did show prior transactions of Morris involving the sale of stolen goods and having in his possession stolen goods.

Upon a review of the whole case we find no error in the record prejudicial to the plaintiff in error, and the judgment of the court of common pleas is affirmed.

Judgment affirmed.

JONES. P. J., and HAMILTON, J., concur.

EXCESSIVE FINE FOR A FIRST OFFENSE.

Court of Appeals for Licking County.

MICHAEL SHONBERG V. THE STATE OF OHIO.

Decided, March Term, 1919.

Regulation of Dealers in Second-hand Articles—Responsible Compliance with the Statutory Requirement having Reference to the Tagging of Articles Purchased—Discretion in the Matter of Sentence.

1. The statutory provisions relating to second-hand stores and junk shops, requiring that persons making purchases of the class of articles therein referred to shall cause "a tag to be attached to such article in some visible or convenient place" etc., is not rendered without effect and void by reason of the fact that in the case of old iron for instance, it would be impracticable or perhaps physically impossible to attach a tag to each and every piece, the attaching of a tag to each pile or lot purchased being a sufficient compliance with the statute where such a difficulty is presented.
2. A fine of \$200 for a first offense in such a case is grossly excessive, and a reviewing court, while affirming the judgment, will send the case back with the suggestion that justice be done in the premises.

L. C. Russell, for plaintiff in error.

Kibler & Kibler, contra.

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HOUCK, J.

This was a criminal action brought under favor of Section 6371 of the General Code. The plaintiff in error, who was the defendant below, was charged with violating a part of this section of the statute. He was a junk dealer engaged in buying and selling iron, and this section of the statute makes it a criminal offense not to tag iron so purchased. He was arrested for a violation of said statute and was taken before a magistrate. Upon trial he was convicted and fined \$200.

It seems that there is a second case pending against him, or it was pending, which was to follow this case, and to be governed by the decision in this one, wherein the same fine was imposed, \$200.

We have examined this record, and we have read the testimony. It is claimed on behalf of counsel for the plaintiff in error, the defendant below, that it is impossible to comply with this statute; that is, that it is physically impossible to tag all pieces of iron and, therefore, that the statute should be declared null and void.

We do not think this contention is sound, because we feel that a reasonable compliance with the statute could be had. That is, that it would not be necessary to tag each article, but to put the articles in a bunch, and one tag would be sufficient. But passing that question, which, to us, is not the serious one in the case. While we hold that the statute is constitutional, and is not void, and that it should be enforced, yet we are unable to understand why a penalty of \$200 was imposed for a first offense. Speaking from the record, there is nothing which would indicate that the accused had ever been arrested before for a violation of this statute or any other statute; and, as the court is advised, we know of no other arrest that has ever been made, or a conviction under this particular part of the statute; and assuming that the accused was a man of reasonably good standing in the community, the court is unanimous in its judgment that the fine is excessive; not only is it excessive, but it is very excessive. We will affirm this judgment and remand

it back to the magistrate, and suggest to counsel for the plaintiff in error to file a motion asking that said fine be reduced to a reasonable sum. The court is not indicating to the magistrate what the amount shall be, but as it now stands it is unreasonable and should be materially reduced. With these suggestions, the judgment will be affirmed, and the case remanded to the magistrate in the hope that counsel will get together and assist in bringing about what clearly appears, to this court, is but simple justice in the premises.

SHIELDS, J., and PATTERSON, J., concur.

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**INFERENCE AS TO AUTHORITY OF CHAUFFEUR TO
OPERATE AUTOMOBILE.**

Court of Appeals for Lucas County.

ROSENBERG V. REYNOLDS.

Decided, December 16, 1918.

*Master and Servant—Presumption that Chauffeur was Acting Within
the Scope of His Employment at Time of the Accident.*

Where the evidence discloses that at the time of plaintiff's injury by an automobile it was the property of the defendant and was being operated by his chauffeur employed to operate the same, an inference arises, in the absence of evidence to the contrary, that the chauffeur was, at the time of the injury, acting within the scope of his employment and about his employer's business.

F. M. Sala and Frank A. Carabin, for plaintiff in error.

Marshall & Fraser and Rathbun Fuller, for defendant in error.

RICHARDS, J.

Heard on error.

On June 13, 1917, the plaintiff, Evelin Rosenberg, a child about four years of age, was struck by the defendant's automobile, which was going north on Linwood avenue, at about the intersection of Beacon street, in the city of Toledo, and so injured that it became necessary to amputate one of her limbs. The defendant was not in the machine, but it was being operated by his chauffeur, Peter A. Donley, and was occupied also by a nephew of the chauffeur and by a twelve-year-old grandson of the defendant. At the conclusion of all the evidence the trial judge directed a verdict for the defendant, on the ground that the chauffeur at the time of the injury was not acting within the scope of his employment. The only question submitted for our consideration is whether it appears as a matter of law that the chauffeur was not acting within the line of his employment, but had abandoned

the same and was on a mission solely of his own, at the time plaintiff was injured.

The defendant was called for cross-examination and from his testimony it appears that he is the owner of the automobile in question; that he resides at 2040 Collingwood avenue, and that on the morning in question Peter A Donley, who had been employed for several years as his chauffeur, called at the residence with the defendant's automobile to take him to the bank located at the corner of Jefferson avenue and Summit street, a trip which he was accustomed to make on the morning of nearly every business day. The grandson of Mr. Reynolds was also in the car and they arrived at the bank shortly after 8 a. m. Mr. Reynolds on arriving at the bank alighted from the car, and testifies that he directed the chauffeur to go to defendant's garage and from there to telephone the defendant's daughter, Mrs. Harris, and find out what time she wanted the automobile to go and see a circus parade which was to be given that forenoon. He also testifies that his chauffeur had the right to take the grandson to the home of his mother or to the garage. The residence of Mr. Reynolds is situated something more than a mile northwesterly from the bank, and the garage is two or three blocks south of the residence, while Mrs. Harris, the daughter of Mr. Reynolds and the mother of the boy, resides on Parkwood avenue, three or four blocks northwesterly from the Reynolds home. From the place where the accident occurred on Linwood avenue to the residence of Mrs. Harris is approximately three-quarters of a mile, north of west.

The testimony of the chauffeur is to the effect that he drove from the bank to the garage, when he telephoned to Mrs Harris, and, learning that she would not want the automobile until 9:45 a. m., drove with the grandson to the armory in order to help his nephew, who had joined the army, select a suit of kahki, and that he stayed only a few minutes at the armory, taking his nephew in the machine, and together they proceeded northwesterly to the place where the plaintiff was struck on Linwood avenue. The armory is situated north of the bank where Mr. Reynolds had alighted and almost directly east of the garage.

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Mrs. Harris, who was called as a witness by the defendant says that the arrangement for her to use the automobile was made between her and her father over the telephone before he left home than morning, and that she does not remember any communication over the telephone that day with the chauffeur. The twelve-year-old grandson of the defendant, who remained with the chauffeur all the time was not called as a witness. If the chauffeur had been intending to drive from the bank to the residence of Mrs. Harris without going to the garage he would have deviated very little from a direct course if he had driven by way of the armory and Linwood avenue.

The law is, of course, well settled that the defendant is liable for any negligence of his chauffeur committed within the scope of his employment and while engaged in his master's business. There can be no uncertainty as to the law; the only difficulty arises in its application and as was stated in the case of the *Lima Ry. v. Little*, 67 Ohio St. 91 (65 N. E. 861), the test of the master's liability is not whether the act was done during the existence of the servant's employment but whether it was done by the servant while acting for the master and in the prosecution of his business. If the record in this case contains evidence that the chauffeur was so engaged at the time of the injury to the plaintiff and the injury was caused by his negligence then the case should have been submitted to the jury for its determination.

We have here the admission by the defendant that he was the owner of the automobile and that it was being driven by his chauffeur, regularly employed for that purpose, and that he had been using the machine on the morning in question while operated by his chauffeur. Whether an inference arises from these admitted facts that the chauffeur was at the time of the injury acting within the scope of his employment is a question upon which the decisions are not in accord, and it would not be possible to reconcile them. Our attention has not been called to any decision of the supreme court of Ohio directly determining this question, but in the *White Oak Coal Co. v. Rivoux*, 88 Ohio St., 18, a closely allied question was involved and the question of

liability was considered. In that case the man who operated the machine was a bookkeeper or cashier and he had no duties whatever to perform in regard to the automobile, the operation of which was entrusted to other persons, and it was held that a *prima facie* case was not made by establishing merely the facts that the automobile was owned by the defendant and was negligently operated by his employe, unless it further appeared that he was driving the automobile with the authority of the owner. A careful reading of the opinion of the court in that case clearly shows that this conclusion was reached because the employe had no duties to perform with reference to the automobile, and the court in the course of the opinion cite with approval various cases where it was held that a *prima facie* case would be made under the circumstances stated if the employe was the regular chauffeur of the defendant, having duties to perform in the operation of the automobile. It appears, therefore, that while the direct question was not decided in that case, yet the only reason why the defendant was exonerated was that no inference of the employe's being within the scope of his employment arose when it appeared that he had no duties to perform regarding the automobile.

Numerous decisions could be cited, where, when it appears that the defendant was the owner of the automobile and that it was being operated by his chauffeur, regularly employed for that purpose, it has been held that it will be presumed that the chauffeur was acting within the scope of his authority and about his employer's business; and if he is not so operating the machine that fact would be one peculiarly within the knowledge of the employer. The reasons for so holding have been often stated by the courts, but we have found no instance where they have been stated with more clearness than in *Kahn v. Home Telephone & Telegraph Co.*, 152 Pac., 240. In the opinion these reasons are stated as follows:

"It has been frequently held by the courts that where an automobile is operated by a person employed for that purpose, it will be presumed that he is acting within the scope of his authority and about his employer's business. If he is not so op-

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erating it, this is a fact peculiarly within the knowledge of the employer, and the burden is upon him to overthrow this presumption by evidence of which the law presumes he is in possession; *Huddy*, *Automobiles* (3 ed.), Sec. 281; *Long v. Nute*, 100 S. W., 511; *Moon v. Matthews*, 76 Atl., 219; *Ludberg v. Barghoorn*, 131 Pac., 1165; *Purdy v. Sherman*, 133 Pac., 440; *Birch v. Abercrombie*, 133 Pac., 1020; *Langworthy v. Owens*, 133 N. W., 867. By the terms, 'raises a presumption,' 'will be presumed,' and other similar language used in the decisions above cited, it is evident it is not meant that the circumstances of the use or possession of an automobile by an employe of the owner raises any presumption of law that the person in charge of it is using it upon the business of the master, but rather that such facts are sufficient to justify a jury in inferring that such is the case; in other words, the fact that a person is in possession of the automobile of another, and the additional fact that he is shown to have been employed by the owner to drive and care for it, taken together, for a chain of circumstantial evidence from which the jury is authorized to infer the further fact that the employee is using the machine upon the employer's business. This being the case, the owner is called upon to rebut the evidence of these circumstances by showing, by testimony satisfactory to the jury, that the real fact is otherwise; that notwithstanding the testimony introduced by plaintiff presents those circumstances which usually justify the inference that the machine is being used for his business and by his authority, the actual fact is that the employe is not so using the machine, but is taking it in connection with his own business and in performance of errands not connected with his employment."

Precisely the same holding was made in *Stewart v. Baruch*, 103 App. Div. (N. Y.) 577. See also *Schreiber v. Matlack*, 90 Misc. (N. Y.) 667; *Healy v. Bernstein*, 168 N. Y. Supp. 44; *Shamp v. Lambert*, 142 Mo. App. 567, 575, and *Glassman v. Harry*, 182 Mo. App., 304.

The inference to be drawn from proof of ownership of the car and employment of the driver is stated in Babbitt on the Law Applied to Motor Vehicles (2 ed.), Section 829.

It is said in *Cunningham v. Castle*, 127 App. Div. (N.Y.) 580, in a case similar to the one at bar, that the testimony of the chauffeur that he was not using the machine in his master's

business was that of an interested witness and that his credibility was for the jury. See also *Ferris v. Sterling*, 214 N. Y., 249 (108 N. E., 406.)

We do not find it necessary to go to the extent announced in the two cases last cited, for the reason that in the case at bar different minds might arrive at different conclusions from circumstances disclosed in the evidence, which would of itself require a submission of the case to the jury. The fact that Mrs. Harris does not remember being called on the telephone by the chauffeur might in the judgment of the jury raise an inference that he had not in fact gone to the garage, but was proceeding direct to the residence of Mrs. Harris by way of the armory and Linwood avenue. The further fact is significant that the twelve-year-old grandson, who was in a position to know all the facts, was not called by the defendant as a witness, nor was his absence from the witness stand explained. Under such circumstances it was open to the jury to draw an unfavorable inference by reason of his unexplained absence.

In the case at bar the admission by the defendant on cross-examination that he was the owner of the car and that the chauffeur was in his employment raised an inference that the chauffeur was at the time of the injury acting within the scope of his employment. In determining the weight to be given this presumption the jury would naturally consider the testimony of the chauffeur, in which he says that he was on a mission purely personal to himself; the testimony of the defendant that he had directed the chauffeur to go to the garage and call Mrs. Harris on the telephone, but that the chauffeur had permission to take the grandson to his own home or to the garage; the unexplained absence of the grandson, who apparently had full knowledge of all the facts; the failure of Mrs. Harris to recall any telephone conversation that day with the chauffeur; and the doubt suggested as to any necessity of telephoning Mrs. Harris if the chauffeur was to take her that morning to see the circus parade if the arrangement had already been made between the defendant and his daughter, Mrs. Harris. The inference arising that the chauffeur was acting within the scope of his employment stands as an item of evidence, and whether it was overthrown by

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the other evidence in the case or whether the other evidence was of equal weight or countervailing force, was a matter to be determined by the jury. *Klunk v. Hocking Valley Ry.*, 74 Ohio St., 125.

The conclusion indicated is not in conflict with the holding in *Rawson v. Olds Motor Works*, 20 C. C. (N.S.) 182; nor with the holding in *Stewart v. Whitford*, 22 C. C. (N.S.), 585. The latter decision was by this court, and in that case it clearly appeared that all parties agreed that the chauffeur had but one purpose in making the deviation which he did, and that was to take his friends to their destination, which was in a direction opposite from that he had been told to go, and no inference could be drawn from the facts not in dispute except one, and there was, therefore, nothing to submit to a jury. The judgment will be reversed and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

CHITTENDEN and KINKADE, JJ., concur.

RECOVERY FOR INJURY FROM MOB VIOLENCE.

Court of Appeals for Butler County.

BUTLER CO. (COMRS.) v. BEATY.

Decided May 19, 1919.

What Constitutes a Mob—Lynching Defined—Liability for Mob Violence Not Limited to Persons in Custody for Crime—Belief of the Mayor in his Inability to Cope With the Situation not a Pre-requisite to Recovery from the County.

1. A collection of people assembled for an unlawful purpose and intending to do damage to workmen returning from their work at a factory where a strike is in progress, constitutes a "mob." and

* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 21, 1919.

an act of violence upon the body of one of such workmen is a "lynching," within the meaning of Sec. 6278, G. C.

2. The liability of a county for damages resulting from mob violence is not limited to one who is apprehended for committing a crime; but a right of action inures to the benefit of one who is not so held in custody.
3. The right to recover damages for injuries from mob violence is not dependent upon the attempted exercise of "correctional power" by a mob, but may be predicated upon acts of violence committed by a collection of people assembled for an unlawful purpose and intending to do damage or injury to anyone.
4. In an action for damages for mob violence it is not error to refuse to charge the jury that the county is not liable until such a degree of disorder has developed that the mayor becomes satisfied he can no longer cope with the situation and calls upon the sheriff to aid in the suppression of such violence.

Isaac C. Baker and Ben. A. Bickley, for plaintiff in error.

Andrews & Andrews and W. C. Shepherd, for defendant in error.

SHOHL, J.

Heard on error.

In October, 1915, there was a strike at the Hamilton Foundry & Machine Co. Defendant in error while returning from his work there was attacked by a group of striking workmen. He brought suit against the county commissioners for the sum of \$5,000, under Part Second, Title II, Chapter 20, General Code, relating to mobs. A verdict and judgment in the sum of \$230.63 was rendered in his favor, and the commissioners prosecute error to this court. An examination of the evidence supports the conclusion that there was a collection of people assembled for an unlawful purpose, intending to do damage to the workmen returning from the foundry and machine company. They, therefore, constituted a "mob" within the statutory definition set forth in Section 6278, General Code. They performed an act of violence upon the body of Martin Beaty, which constituted a "lynching" as defined in the same section.

The "Mob Act" is constitutional, *Champaign Co. (Comrs.) v. Church*, 62 Ohio St., 318, and must be liberally construed,

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Phillips Sheet & Tin Plate Co. v. Griffith, 98 Ohio St. 73. It is contended by plaintiff in error that the statute in question relates only to acts of violence by a mob against one apprehended for committing a crime, and can not be applied to acts of violence against persons not so held in custody. Special charge No. 7, which the court refused to give, is based on this contention. Under Section 6278 a mob is either a collection of people assembled for an unlawful purpose and intending to do damage or injury to any one, or a collection of people pretending to exercise "correctional power" over other persons by violence and without authority of law. An examination of the statute discloses that a mob may be constituted in either of two ways, only one of which requires the pretended exercise of correctional power. There is no justification, therefore, in limiting the liability imposed by statute solely to cases of mobs of the second character to the exclusion of a mob comprised as defined in the first part of the section. No authority is cited by the court in the opinion of *Gray v. Gibson*, 12 N.P.(N.S.), 673, to support the opposite conclusion. At common law counties or municipal corporations are immune from liability for failing to preserve the public peace in the absence of a statute. (28 Cyc., 1295). The policy of imposing liability upon a civil subdivision of government has long been recognized and enforced. In *Chicago v. Sturges*, 222 U. S., 313, at page 323, the court says:

"The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Angle-Saxon people. Thus, 'The Hundred,' a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. 1 c. 1, coming on down to the 27th Elizabeth, c. 13, the Riot Act of George I (1 Geo. I, St. 2) and Act of 8 George II, c. 16, we may find a continuous recognition of the principle that a civil subdivision entrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar

character have been enacted by several of the states and held valid exertions of the police power. *Darlington v. Mayor*, 31 N. Y., 164; *Fauvia v. New Orleans*, 20 La. Ann., 410; *Allegheny County v. Gibson*, 90 Pa. St., 397. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law."

See also *Wells Fargo & Co. v. Jersey City*, 218 Fed., 699, and 4 Dillon, Municipal Corporations (5 ed), Section 1636. The cases cited in the note in Dillon show that some of the statutes are applicable to injuries as well as damage to property. The statute under consideration was originally passed in 92 O. L., 136, entitled, "An act for the suppression of mob violence." It is therefore, of the same character as the statute referred to in the foregoing authorities, the purpose of which is to punish the inhabitants of a community for permitting riots, and to incite them to suppress and prevent the same by making it a matter of interest to the taxpayers to give their moral support to the enforcement of law and order. See note to *Pittsburg, C., C. & L. Ry. v. Chicago*, 242 Ill., 178. Liability under such a statute has been upheld where the person lynched was not a prisoner. *Brown v. Orangeburg County*, 55 S. C., 45 (32 S. E., 764). The court did not err in refusing to give special charge No. 7.

Complaint is made of the refusal of the court to give special charges to the effect that the defendants were not liable until such a degree of disorder has developed that the mayor becomes satisfied that he can no longer cope with the situation and calls upon the sheriff to aid in the suppression of said violence. The statute by its terms does not require such a request. If there is a lynching the statute imposes a liability on the county. There is

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no basis in the language of the statute for the requirement that the mayor should call upon the sheriff for aid. Where the language of the statute is plain and admits of no more than one meaning, there is no duty on the court to interpret it. Its meaning must in the first instance be sought in the language in which the act is framed, and if that is plain, and if the law is constitutional, the sole function of the courts is to enforce it according to its terms. *Elmwood Place v. Schanzle*, 91 Ohio St., 354, 357; *Slingluff v. Weaver*, 66 Ohio St., 621; *Woodbury & Co. v. Berry*, 18 Ohio St., 456; *Caminetti v. United States*, 242 U. S., 470, 485, and *United States v. Detroit First National Bank*, 234 U. S., 245, 258; *United States v. Lexington Mill & Elevator Co.*, 232 U. S., 399, and *Lake County v. Rollins*, 130 U. S., 662, 670, 671.

When we consider the express statement of the court in *Phillips Sheet & Tin Plate Co. v. Griffith*, *supra*, that the act is to be liberally construed, there is no warrant for the restriction contended for. The court did not err in refusing the special charges requested.

Judgment affirmed.

HAMILTON and CUSHING, JJ., concur.

AUTHORITY TO ALTER THE LOCATION OF A LIVING STREAM

Court of Appeals for Greene County.

HARSHMAN V. BOARD OF COMMISSIONERS OF GREENE COUNTY.*

Decided, November 9, 1917.

County Commissioners—Without Jurisdiction to Divide a Living Stream Into Two Channels—Ditch Proceedings—Remedy of the Land Owner.

1. The authority of county commissioners does not comprehend the power to divide the waters of a living stream into two channels.

* Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, March 5, 1918.

When an alteration in the channel of a living stream is made under Section 6443, General Code, provision should be made for tributaries and laterals emptying into the new channel at convenient points near the place or places where such tributaries or laterals empty into the original stream.

2. Where the board of county commissioners is without jurisdiction and the want of jurisdiction does not appear on the face of the ditch proceedings, the remedy of the landowner affected is by way of an original action in equity for injunction.

Messrs. Hagan & Hagan; Mr. Charles S. Darlington and Mr. Marcus Shoup, for plaintiff in error.

Mr. W. L. Miller and Mr. H. D. Smith, for defendant in error.

FERNEDING, J.

Heard on Error.

Plaintiff, John F. Harshman, is the owner of certain farm lands in Beaver Creek township, Greene county, through which Beaver Creek, a living stream flows in a southeastwarly direction. Another living stream called Gray's Run also enters plaintiff's land, and flows into Beaver Creek near the northern end of plaintiff's land.

It appears that, in the year 1913, upon petition of certain landowners, the board of county commissioners of Greene county ordered the improvement of Beaver Creek by straightening, widening, deepening and changing the same through and for several miles above and below plaintiff's lands. The plaintiff was assessed a large amount for said improvement, which has been constructed upon the line of the original channel of Beaver Creek through plaintiff's lands, but the same has not been fully completed below plaintiff's farm. Subsequently, on November 11, 1916, upon petition of landowners above plaintiff's lands, the commissioners ordered the construction of an improvement by an alteration to be made in the channel of Beaver Creek. This contemplated a new channel, beginning a short distance above the outlet of Gray's Run in plaintiff's land, running thence roughly parallel to the old channel of Beaver Creek, and at no point more than 250 feet distant therefrom. The stream was to extend through plaintiff's lands, on the south side thereof, thence

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over the land of George M. Shank, and finally to rejoin said former channel at a point about one-half mile from the beginning of said new or altered channel. It also appears that the board of county commissioners in the construction of said improvement intend to fill up the old channel immediately above Gray's Run in plaintiff's land and thereby divert the upper waters of Beaver Creek into the new channel. This would leave the waters from Gray's Run to continue in the old channel through plaintiff's land. The result would be to perpetuate two separate and distinct channels in close proximity to each other for more than 1,000 feet over plaintiff's land, and thus impose a substantially new burden upon him.

It is contended upon behalf of plaintiff that the county commissioners have no jurisdiction under the statute to provide for the proposed alteration of Beaver Creek by the establishment of said additional channel.

We have reached the conclusion, after a careful consideration of the statute and the decisions, that the authority of the county commissioners does not comprehend the power to divide the waters of a living stream like Beaver Creek into two separate channels. When an alteration in the channel of a living stream is made, under Section 6443, General Code, provision should be made for tributaries and laterals emptying into the new channel at a convenient point near the place or places where such tributaries or laterals empty into the original stream.

We are of the opinion that the statute does not justify the carrying of the tributaries in a separate channel as contemplated in the present improvement. The principle announced in the case of *Commissioners of Greene County v. Harbine*, 74 Ohio St., 318, justifies us in applying a strict construction of Section 6443, General Code, as applied to living streams.

The defendant county commissioners in their answer allege that the plaintiff in the original ditch proceedings appealed to the probate court upon the question of compensation and damages; also upon the question of the location of the proposed alteration and the practicability of the route; and that the sum of \$1,625 was allowed the plaintiff for compensation and damages. The

other questions were decided in favor of the commissioners. The commissioners further allege that no appeal or error was prosecuted from said judgment of the probate court, and that in consequence thereof the plaintiff has had his remedy and is estopped from the present proceedings.

We think this is the most serious question in the case. We have reached the conclusion that were the board of county commissioners without jurisdiction, and the want of jurisdiction not appearing upon the face of the ditch proceedings, the remedy of the landowner affected is by way of an original action in equity for injunction. We are therefore of the opinion that the plaintiff was entitled to an injunction against the construction of said alteration or new channel of Beaver Creek over and across his said lands.

Decree accordingly.

KUNKLE and ALLREAD, JJ., concur.

CONFIRMATION OF JUDICIAL SALE.

Court of Appeals for Cuyahoga County.

LAKE SHORE SAW MILL & LUMBER CO. V. CLEVELAND
REALIZATION CO. ET AL.

Decided, May, 1919.

Judicial Sales—Discretion of Trial Judge as to Confirmation—Subject to Review, but not to Reversal, Unless.

1. The question whether or not a sale of real estate by the sheriff in a foreclosure proceeding should be confirmed rests in the sound discretion of the court, and an order of confirmation will be reversed only upon proof of abuse of such discretion.
2. An abuse of discretion is not shown by the mere fact that one or more of the reviewing judges would have exercised such discretion in a manner different from that of the trial court.

Young, Stocker & Fenner, for plaintiff in error.

A. Lewenthal and *W. S. Hannon*, for defendants in error.

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BY THE COURT.

Heard on error.

This is a proceeding in error to reverse the common pleas court for refusing to confirm a sale of real estate made by the sheriff in a foreclosure proceedings, where it is conceded that the proceedings were regular and in all respects according to law.

The question is suggested that this is not such a judgment or final order as is subject to review by this court, but that question was not argued and we do not find it necessary to consider it.

We take it to be settled that the question of whether or not a sale should be confirmed rests in the sound discretion of the trial court, and, if subject to review, the order of the lower court can be reversed only when the record discloses that the trial court has abused its discretion. It is a wise public policy which vests such discretion in the trial court.

An abuse of such discretion is not shown by the mere fact that one or more of the judges of this court would have exercised the discretion differently if sitting as a trial court.

We have carefully examined this matter and are unable to say that the trial court abused its discretion.

The judgment will, therefore, be affirmed.

Judgment affirmed.

DUNLAP, WASHBURN and VICKERY, JJ., concur.

SERVICE OF COPY ON OWNER.

Court of Appeals for Cuyahoga County.

LAKE ERIE LUMBER & SUPPLY CO. v. MARSHALL ET AL.

Decided, July 7, 1919.

Mechanics Liens—Service on Owner of Carbon Copy of Affidavit Sufficient.

The sending of a carbon copy of the affidavit to obtain a lien, which copy is in all respects a duplicate of the original excepting only that it lacks the name of the affiant at the end of the affidavit and

the name of the notary at the end of the jurat, accompanied by a letter to the owner stating that the same is a copy of the affidavit filed, all of which is done within the thirty day period provided for in Section 8315 General Code, is a sufficient compliance with the provisions of said section requiring service on the owner or his agent of a copy thereof.

F. V. Hartman, for plaintiff.

Maurer, Bolton, Wilson & McGiffin, for defendants.

BY THE COURT.

In this cause, which is here heard upon appeal, we hold that the sending of a carbon copy of the affidavit to obtain a lien, which copy is in all respects a duplicate of the original excepting only that it lacks the name of the affiant at the end of the affidavit and the name of the notary at the end of the jurat, accompanied by a letter to the owner stating that the same is a copy of the affidavit filed, all of which is done within the thirty day period provided for in Section 8315, General Code, is a sufficient compliance with the provisions of said section requiring service on the owner or his agent of a copy thereof. The lien of the Lake Erie Lumber & Supply Company will, therefore, be sustained.

In reference to the claim of the R. L. Quiesser Company, the validity of its lien depends upon a question of fact. Without going into an analysis of the evidence, it will be sufficient to say that the court finds that the evidence preponderates in favor of the claim of said company, and we hold that the said R. L. Quiesser Company has a valid lien.

A journal entry may be drawn sustaining these two liens and the claims of all the cross-petitioners in the court below, just as was done by the common pleas court.

Judgment accordingly.

DUNLAP, WASHBURN and VICKERY, JJ., concur.

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Jefferson County.

RIGHT OF LATERAL SUPPORT IN UNDERGROUND MINING.

Court of Appeals for Jefferson County.

UNITED STATES COAL CO. v. WAYNE COAL CO.

Decided June 22, 1919.

Mines and Mining—Injury to Lateral Support of Underground Mine by Stripping May be Enjoined.

The plaintiff and defendant are both engaged in mining coal, and are respectively the owners of adjoining properties derived from a common grantor. The plaintiff employs the underground method of mining, while the defendant uses the process known as "stripping," and in conducting its operations has removed the surface over its portion of the vein of coal up to a part of the plaintiff's property line.

Held: That the plaintiff has the right to the lateral support of the surface contiguous to its own premises, and the further removal of such surface will be enjoined where it is shown that such removal materially affects the lateral support of the plaintiff and thereby endangers its mining operations.

A. C. Lewis, L. C. Kerr and Henderson, Quail, Siddall & Morgan, for plaintiff.

W. R. Alban and Dio Rogers, contra.

METCALFE, J.

Heard on appeal.

The plaintiff in this case seeks to enjoin the defendant from conducting certain mining operations which plaintiff claims work an injury to its property.

The plaintiff is engaged in mining coal by the process known as "underground mining;" the defendant is engaged in mining coal, but by a process entirely different from that used by the plaintiff company, known as the "stripping process."

In 1900 one James Hubler and his wife executed and delivered to Robert E. Rhodes and Morris A. Bradley a warranty deed for all minable coal in what is known as the No. 8 or Pitts-

burg Vein of coal underlying their farm in Wayne township, Jefferson county, Ohio.

The superficial area of the amount of coal thus conveyed is included in what is known as the Van Atta Survey, and contains about ninety-seven acres of land.

The deed also granted to Rhodes and Bradley an uninterrupted right of entry upon the lands of the grantors, at such points and in such manner as might be deemed necessary to conduct mining operations, convey supplies to the mine and carry away coal therefrom, and also contained a waiver of any damages arising from the occupancy of the premises by the grantees and the use thereof for mining.

It also conveyed the right of mining and removing through the premises of the grantors, other than those granted by deed, coal which might be mined from other lands owned by the grantees.

In 1902 Rhodes and Bradley sold and conveyed to the plaintiff all of their interest in the lands in question, and the plaintiff is still the owner thereof, but at present is not conducting any mining operations thereon.

The Wayne Coal Co., the defendant, afterwards became the owner of other lands owned by the original grantors of the plaintiff, the Hublers, and is conducting mining operations thereon by what is known as the "stripping process."

The method employed by the defendant is to remove the surface over the vein of coal with a steam shovel, thereby exposing the vein and permitting the use of machinery in taking out the coal; and in conducting their operations they have stripped the surface and removed the coal from portions of their premises to the survey line of the plaintiff's property.

The defendant has acquired the ownership of a considerable acreage of coal adjoining the premises of the plaintiff, with the right to mine such coal by removing the surface.

It is the claim of the plaintiff that by use of the "stripping process," as employed by the defendant company, the defendant is encroaching upon the rights of the plaintiff, in removing the lateral support from the plaintiff's part of the vein of coal so

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as to greatly endanger the use of the plaintiff's premises in conducting mining operations thereon.

The defendant has mined up to the line of the so-called Van Atta Survey for a distance of several hundred feet.

The first question here presented is whether or not the operation of mining by the "stripping process," so-called, up to the line of the plaintiff's property, is such a removal of, and weakening of, the lateral support over plaintiff's coal as to endanger and render impracticable the mining of coal from plaintiff's premises by the method of mining employed by plaintiff.

The question thus presented is a novel question and so far as we are informed is a question of first inception in the courts of Ohio, and we find no decisions from other states involving the same question. We are left, therefore, to determine the question upon general principles, and upon the authorities governing the questions of the right to lateral support, where the questions at issue were similar or analogous to those of the instant case.

The mining of coal by the "stripping process" has only come into practice within the past few years and could not have been in the minds of the parties when the deed was executed from the Hublers to Rhodes and Bradley, for no such process was known at that time. It does not, however, follow that the defendant has not a right to use that process or any other new or improved method of mining by machinery or otherwise, which has come into use.

The parties here stand in the same position as the parties to the original deed. The rights of each are neither greater nor less than the rights of the parties to that conveyance. The idea that the surface of the land outside of that conveyed to the plaintiff would be removed to a depth of thirty feet or more could not have been contemplated by the parties.

The grantees of the deed supposed that they were purchasing all of the coal underlying the grantor's premises, which, by the processes of mining then known, was considered minable coal, the balance of the coal being considered unminable because of the shallowness of the surface above it,

It seems to us fairly shown by the evidence that such removal of the surface up to the line of the plaintiff's property is, in effect, a removal of the lateral support from the plaintiff's property in conducting mining operations, which, if carried out to the extent of removing the surface up to the plaintiff's land around its entire property, would be absolutely destructive of the plaintiff's right, so that the extent to which the defendant carries on its operation up to the plaintiff's line leaves it only a question of degree as to the injury done to the plaintiff.

The removal for a very small distance along the line of the plaintiff's property might not be injurious to the plaintiff at all for the reason that the remaining surface upon the same side would be sufficient to furnish the necessary support, but the defendant in this case has removed that support for a distance of several hundred feet, and contemplates, as we understand from the evidence, removing it for a much greater distance. We have no doubt from the evidence in this case that such removal would be a material injury to the plaintiff.

It is urged on the part of the defendant, that, as the plaintiff company is not now using its property for mining purposes, any injury which might result from the defendant's operation does not give rise to a present cause of action, but would give rise only to a cause of action in the future when the damage actually occurs. We think this position is untenable.

If the plaintiff is not now exercising its right to use its premises for mining purposes, it has purchased the premises for that very purpose; and can it be said that it is not a present injury if the acts of the defendant will effectually prevent the use of the plaintiff's premises in the future, or so weaken its lateral supports as to endanger the use of the premises for that purpose?

We think the plaintiff is entitled to the relief asked for, and in this judgment we think we are sustained by many well-considered cases.

1 High, Injunction (4 ed.), Sec. 753, says:

"The right to lateral support is regarded as an incident to the ownership of land, and its infringement has been con-

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sidered as a nuisance which equity may enjoin. Thus, the removal and excavation of earth upon adjacent premises in such manner as to endanger the stability of complainant's soil and fences, by removing their lateral support, will be enjoined."

And Sec. 667 of the same work says:

"While diligence in the assertion of his rights is indispensable on the part of one who seeks the aid of equity for the prevention of waste, the utmost degree of promptitude is exacted in cases of waste in mines, owing to the peculiar nature of the property."

The author further illustrates these principles in Secs. 850 and 852 of the same work.

In *Burgner v. Humphrey*, 41 Ohio St., 340, it is held that where the owner of the land conveys by lease the underlying coal on his premises, with the right to remove the same, the lessee will not be entitled to remove the whole of the coal so as to endanger the support to the surface. On page 352 the court say:

"It seems to be well settled, that when one owning the whole fee, grants the mineral, reserving the surface to himself his grantees will be entitled only to so much of the minerals, as he can get without injury to the superincumbent soil, unless, the language of the instrument clearly imports that it was the intention of the grantor to part with the right to subjacent support. * * * The owner has a natural right to the use of his land, in the situation in which it was placed by nature, and if the surface of the land and the minerals beneath belong to different owners, the owner of the surface is entitled to have it supported by the underlying mineral strata, and, an action may be maintained against the owner of the minerals, for the damages sustained by the subsidence. Each owner must so use his own as not to injure the property of the other."

If the owner of the minerals has no right to injuriously affect the rights of the owner of the surface, the converse of the proposition must be equally true, that the owner of the surface can not destroy it to the extent of seriously injuring and endangering the rights of the owner of the minerals.

The defendant stands in the shoes of its grantor, the common grantor of itself and the plaintiff, and where a continuance of its acts will work a serious injury to the property of the plaintiff we think plaintiff is entitled to have such acts restrained. *Elliot v. N. E. Ry.*, 10 H. L. C., 334, 11 Eng. Rep. Re., 1055; *Caledonia Ry. v. Sprot*, 1 Pater (Ss. App.), 633, 17 Eng. Ru. Cas., 696; *Keating v. Cincinnati*, 38 Ohio St., 141; *Joyce v. Barron*, 67 Ohio St., 264; *Murray v. Pannaci*, 64 N. J. Ep., 147, 154 (53 Atl., 595); *Simon v. Nance*, 45 Tex. Civ. App., 480 (100 S. W., 1038); *Belden v. Franklin*, 8 C.C.(N.S.), 159; *Catron v. South Butte Mining Co.*, 181 Fed., 941; *Seitz v. Coal Valley Mining Co.*, 149 Ill. App., 85; *Big Six Development Co. v. Mitchell*, 138 Fed., 279 (1 L. R. A. [N. S.], 332); and *Collins v. Gleason Coal Co.*, 140 Ia., 114 (115 N. W., 497; 118 N. W., 36).

The defendant has an undoubted right to use the "stripping process" in conducting its mining operations and should only be enjoined from removing the surface so near to the plaintiff's property line as to materially affect the plaintiff's lateral support, and, while the fixing of the line up to which the defendant may mine must of necessity be somewhat arbitrary, we are of the opinion that under the evidence thirty-five feet will be sufficient to afford the plaintiff protection.

Injunction granted accordingly.

POLLOCK and FARR, JJ., concur.

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Guernsey County.

**APPEAL WITH REFERENCE TO A TOWNSHIP
BOUNDARY LINE.**

Court of Appeals for Guernsey County.

IN THE MATTER OF THE ESTABLISHMENT OF THE BOUNDARY LINE
BETWEEN WILLS TOWNSHIP AND CENTER TOWNSHIP
IN GUERNSEY COUNTY, OHIO.

Decided, November 20, 1919.

*Disputed Boundary Line Between Townships—Right of Appeal to the
Court of Common Pleas from Finding or Award of County Com-
missioners.*

Where application is made to county commissioners to establish a dis-
puted boundary line between two townships and a finding is made
by the commissioners as provided in Section 3248, G. C., establish-
ing such line, the right of appeal lies from their finding to the
court of common pleas of such county under favor of Section 2461,
G. C.

Fred L. Rosemond for plaintiff.

Robert T. Scott for defendant.

FARR, J.

This is a proceeding in error, prosecuted here to reverse the
judgment of the court of common pleas of this county.

The action in the court below was an appeal from the finding
or award of the county commissioners to whom application was
made to establish the boundary line between Wills and Center
townships, this county. A hearing was had as provided by stat-
ute and a finding made by the county commissioners from which
an appeal was sought to be perfected to the court of common
pleas of Guernsey county where a motion was made to dismiss
for want of jurisdiction, which motion was sustained by the court
of common pleas and the cause is here upon the question of the
right of appeal from the finding of the county commissioners.
Among the related sections of the General Code is Section 3248
which provides that:

“When a boundary line between townships is in dispute the commissioners of the county in which the townships are situated, upon application of the trustees of one of such townships, and upon notice in writing to the trustees of such civil township or townships, and on thirty days public notice printed in a newspaper published within the county, shall establish such boundary line, and make a record thereof in a book kept for that purpose.”

The foregoing relates to the duties of county commissioners in case application be made to establish a disputed boundary line between townships; however, it is not the duty of the commissioners in this regard which is of primary importance here, but the right of appeal from their finding. If such right obtains in favor of either party it is under favor of Section 2461 General Code, which provides as follows:

“2461. A person aggrieved by the decision of the county commissioners in any case, may appeal within fifteen days thereafter, to the next court of common pleas, notifying the commissioners of such appeal at least ten days before the time of trial. The notice shall be in writing, and delivered personally to the commissioners, or left with the auditor of the county. At its next session, the court shall hear and determine the appeal, which decision shall be final.”

This section has been the subject of considerable discussion, and there are numerous adjudications under it beginning with the early judicial history of the state, a number of which it is not necessary to discuss in determining the issue here. A case well upon the point and fairly decisive of the issue in the instant case is *Commissioners of Belmont County v. Zeigelhofer*, 38 O. S., 523.

This case arose over a contract awarded by the county commissioners for tearing down and rebuilding a protecting wall on a county road. After the completion of the wall, and the refusal of payment of the balance claimed to be due by the contractor, suit was brought before a justice of the peace to recover the same. From a judgment against the commissioners they appealed to the court of common pleas, where a motion to dismiss was made for want of jurisdiction for the reason that plaintiff's exclusive rem-

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edy was an appeal from the action of the commissioners in refusing to allow and order the claim paid. Section 18 of an act establishing boards of county commissioners and prescribing their duties (1 S.&C., 247), which was then in force, is almost identical with above Section 2461, General Code. It was held as follows:

“Where a claim against a county, which must be allowed by the commissioners before it can be paid, is founded exclusively on a statute, the remedy by appeal provided by Section 18 of “an act establishing boards of county commissioners and prescribing their powers and duties (1 S. & C., 247) is exclusive; but where such a claim is founded upon a contract, which the commissioners are authorized to make, and they refuse to perform such contract, or disallow the claim, the remedy by appeal and the summary proceedings provided for by said section, is cumulative merely, and the claimant is entitled to have his action thereon against the county by due course of law, in any court of competent jurisdiction.”

The foregoing, therefore, fixes the right of appeal in such cases.

Johnson, J., in passing upon the above case reviews practically every important related case beginning with *Commissioners v. Robb* (Wright, 48), similar as to facts to the Belmont county case, and it was not held that an appeal was an exclusive remedy; the same case is found in 5, Ohio, 491; *Paine v. Commissioners* (Wright, 471) is discussed and a like conclusion reached; likewise *Shepherd v. Commissioners of Darke County*, 8 O. S., 354, where it was sought to enforce a claim by a county recorder against the commissioners for making a new general index to the records of the county, and for which it was provided that recorders should receive such compensation as the commissioners shall deem reasonable and just.

Swan, J., in the opinion at page 357 observes as follows:

“Whenever the board of commissioners are authorized to allow or reject claims against the county, the party aggrieved may appeal.”

But what was actually held is that:

“Where a claim against the county is of such a nature that but for the statute no right of action at common law would exist

on the claim, the remedy prescribed by the statute must be pursued, and no cumulative remedy exists."

The principle established in Shepherd's case was re-affirmed in *State ex rel Gerke v. Commissioners*, 26 O. S., 364, which applied to a claim for attorney's services in prosecuting suits for the county treasurer for the collection of taxes.

And in his summary of the foregoing Johnson, J. in *Commissioners v. Zeigelhofer*, at page 528, declares the rule of construction in such cases to be as follows:

"These cases rest upon the well settled rule of construction, and where, by statute, a liability is created, and a specific remedy is given, it is exclusive, but when a specific remedy is given for an existing right of action for which there is a remedy by due course of law, the new remedy is merely cumulative, unless it clearly appears to be the intention of the Legislature, that it be to the exclusion of the existing remedy. *Commissioners v. Bank*, 32 O. S., 194, 201; *Darling v. Peck*, 15 Ohio 65; *State v. Orr*, 16 O. S., 523; *Sedgwick on Statute Law*, 341-345; *Hardcastle on Rules of Con.*, 163-169."

And the foregoing fairly determines the issue here. In the cases considered it will be observed that when it was a question of liability on contract the right of appeal was held to be cumulative in character.

In the instant case the duties of the board of commissioners are defined by statute. Impliedly they might call, and in the instant case they did summon and hear, numerous witnesses. They determined the question at issue as a tribunal, although it is urged that they performed merely administrative duties; that they did not render a judgment and had no authority or jurisdiction to do so; that if they had, their act would have been *coram non judice*. However, they made a finding upon the issue, and it would be drawing a very fine distinction, under the provisions of above Section 2461, G. C., to hold that there was no right of appeal; that the finding of the board is final and conclusive, especially in so important a matter as establishing a boundary line between townships, wherein, if an error be made, it must remain so for all time. Such was not the legislative intent.

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It is urged, however, that there are numerous adjudications under the above Section 2461, holding that there was no right of appeal. An examination of these cases discloses that they are practically all different as to facts and in *Kendig v. Commissioners*, 82 O. S., 315 at page 322, Price, J., declares the rule to be that:

“No appeal is given from the decision of the trustees or commissioners to a court in which the owner may have his compensation determined by a jury.”

And in connection with his discussion of Section 896 R. S., now Section 2461, General Code, the case of *Hendershot v. State*, 44 O. S., 209, is also discussed which is somewhat helpful.

It was also properly observed in the Belmont county case at page 529:

“When such a contract is made within the scope of the authority conferred, the obligations arising therefrom, are to be determined by common law principles, in the absence of statutory provisions to the contrary. The right is not founded on a statute, but on a contract made by a quasi corporation.”

But such is not the case here, nor is there a jury issue. The jurisdiction of the commissioners as provided in this statute was invoked by the application of the township trustees of the township applying for the establishment of the boundary line, and the board having made its finding the statute prescribing the right of appeal as well as the right of action in the board of county commissioners, appeal lies from the award of the commissioners to the court of common pleas.

Therefore, the judgment of the court below is reversed, and exception noted.

METCALFE, P. J., and POLLOCK, J., concur.

**ORDINARY CARE REQUIRED OF LESSEE TO PREVENT
OVERFLOW OF SINKS.**

Court of Appeals for Hamilton County.

HEIL v. PROCTOR.

Decided, May 16, 1919.

*Allegations as to Negligence in Permitting Water to Overflow Sink—
Indefiniteness and Uncertainty in Petition Waived by Answer—
Duty of Lessee to Shut off Flow of Water on Floor Occupied by Him.*

- 1 A petition which merely alleges that the defendant negligently and carelessly caused and allowed water to overflow the sink and drains and run through the floors into the rooms occupied by the plaintiff as tenant, should, on motion, be made more definite and certain by setting out what the negligent acts or omissions were.
2. Indefiniteness and uncertainty in a petition are waived by answer, and in such event can not be the basis for directing a verdict for the defendant at the close of the evidence for the plaintiff.
3. The duty rests upon the lessee of an upper apartment to use ordinary care to shut off the flow of water into a sink, and to prevent obstructions to the outlet of the sink, and the duty to use that care continues although the landlord had on various occasions shut off the water in the supply pipe in the hallway when there was danger of freezing.

Ochiltree & Dussol and H. E. Englehardt, for plaintiff in error.

Hackett, Yeatman & Harris, contra.

RICHARDS, J.

On and prior to February 19, 1917, the plaintiff, Nellie A. Heil, occupied, for the purpose of conducting a printing shop, the fifth floor of a building known as No. 124 Government Place, Cincinnati, and the defendant, Frederick Proctor, occupied the sixth and seventh floors of the same building, which floors he used in his business of bookbinding. On the date named, the rooms occupied by the plaintiff were flooded with water coming from the sixth floor of the building. This action was brought by her for the purpose of recovering the damage

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to her property caused by the same being flooded by water coming from the rooms occupied by the defendant.

At the close of the evidence offered on behalf of the plaintiff the trial judge directed a verdict for the defendant, and judgment was rendered thereon, and it is now contended that the trial judge erred in directing the verdict. The action of the trial judge was based upon the ground that the allegations of the petition were insufficient to charge the defendant with negligence, and upon the further ground that the evidence which was introduced did not make a case for the plaintiff sufficient to be submitted to the jury.

It appears from the averments of the petition that both parties to this litigation were tenants of the same landlord, who owned the entire building and sublet the same to various tenants, and that there was a sink on the sixth floor of the building, in the rooms occupied by the defendant, which sink was used by him in conducting his business as occasion might require. The petition avers "that the defendant, his servants and agents negligently and carelessly caused and allowed large quantities of water to overflow said sink and drains and run and flow through the floors and down into the rooms occupied by the plaintiff as tenant," and it is urged that this is merely the averment of a conclusion and not sufficient to charge the defendant with any negligent act. The petition was not assailed by motion or demurrer and no objection was made at the opening of the trial to the introduction of any evidence under the petition. This court is of opinion that the petition would be subject to a motion to make more definite and certain, but that the defendant having answered by a general denial and gone to trial without objection it is too late thereafter to contend that the petition was insufficient to charge the defendant with actionable negligence. If the defendant contended that the petition was too indefinite and uncertain in the respects named, it should have been assailed by motion as indicated in *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St., 326. The rule applicable in such cases is well stated in 3 Bates' Pleading, Practice, Parties and Forms, 2263, that an averment that

an act, omission or conduct is negligent is generally deemed an averment of fact and not demurrable as being a mere conclusion, and if not objected to by motion will sustain evidence of any negligence in relation to the general conduct charged. See also *Altman v. Devou*, 18 N. P. (N. S.), 487, a decision of the Common Pleas Court of Hamilton County, affirmed by the court of appeals without opinion. See also *Laithe v. McDonald*, 7 Kans., 254.

We have no difficulty in reaching the conclusion that while the petition was subject to a motion to make more definite and certain, the fact of its indefiniteness and uncertainty in charging negligence could not be a basis for directing a verdict for the defendant.

It is insisted, however, that the evidence offered by the plaintiff was not sufficient to take the case to the jury. The evidence tended to show that the defendant and his employes carried the key to the rooms occupied and used in his business, and that water was supplied through a faucet to the sink on the sixth floor used by him; that on the morning of February 19, 1917, certain glue pots and other utensils were found in the sink; that soft, mushy glue had escaped therefrom and was in the bottom of the sink and had clogged the outlet; and that water had overflowed from the sink onto the floor and thus found its way down into the rooms of the plaintiff. Some evidence was introduced tending to show that on certain occasions, when there was danger of freezing, the janitor or elevator man, employed by the owner of the building, turned off the water in the hallway, and that when so shut off no water would flow through the faucet into the sink used by the defendant, and that on Saturday, February 17, it had not been shut off by the employes of the landlord. It is not apparent from the record how the defendant would know whether the landlord's employes on the occasion under investigation would or would not believe that there was danger of freezing, or whether they would or would not shut off the water in the block; or how the failure to do so would excuse the defendant for leaving the faucet in the sink open from Saturday afternoon until Monday morning, if he did do so. Manifestly the duty rested on the defendant him-

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self to use ordinary care in closing the faucet or preventing obstructions in the sink used by him. We have no doubt that sufficient evidence was offered to require that the case should have been submitted to the jury, and for error of the court in directing a verdict for the defendant the judgment will be reversed and the cause remanded for new trial.

KINKADE and CHITTENDEN, JJ., concur.

OCCUPATIONAL DISEASE.

Court of Appeals for Cuyahoga County.

INDUSTRIAL COMMISSION OF OHIO v. McMANIGAL.

Decided, June 13, 1919.

Employee Breathes Poisonous Fumes While at Work—Pneumonia Results with Fatal Results—Widow not Entitled to Compensation.

Where an employee in the course of his employment is compelled to breathe poisonous gases and as a result thereof develops pneumonia causing his death, such does not constitute an "occupational disease."

Samuel Doerfler and R. A. Baskin, for plaintiff in error.

John A. Cline, contra.

DUNLAP, J.

Heard on error.

Hugh McManigal, the plaintiff's decedent, was an electrical worker in the employ of the F. M. Grant Co. of Cleveland, and in February, 1917, with other workmen, was engaged in installing electric wires and conduits in a new factory building, partly completed, and owned by the Peerless Automobile Co. of Cleveland.

The building had a gabled roof and ceiling and was heated by open stoves or salamanders, between thirty and fifty in all, burning coke, and throwing off carbon-monoxide and carbon dioxide gases.

The electrical conduits were being attached to and along

certain iron beams in the roof, and McManigal was required to work close to the ceiling, suspending on a temporary scaffold.

The air in the building was so contaminated with gas that workmen experienced therefrom a feeling of suffocation, headache, dizziness and a soreness in the chest and eyes, and were compelled to go outside for air about every half-hour. At the end of the day's labor workmen also experienced from these gases a listless feeling.

The evidence shows that McManigal, at his work on the beams near the ceiling, breathed in these gases for five days, and was caused considerable annoyance; likewise was compelled to frequently leave his work and come down for fresh air. He was seen to cough frequently and hold his chest as though in pain.

On the evening of February 24, 1917, he was taken sick with chills and fever, but arose the next morning and worked all that day, which was Sunday. On Sunday evening he again suffered from a fever, but nevertheless worked the following day, which was Monday. On Monday evening, being no better, and quite sick, his wife called a physician and he was found to be suffering from pneumonia, from which he died on March 4, 1917, leaving a widow and two children.

The F. M. Grant Co. was insured under the Workmen's Compensation Act, and McManigal's widow made application to the Industrial Commission for compensation, basing her claim on the ground that Hugh McManigal's death was caused by breathing in the gas fumes at the plant of the Peerless Automobile Co., which produced pneumonia, the immediate cause of his death.

The commission, however, denied her claim, and she thereupon filed a petition in the common pleas court, and the case proceeded to trial, with a verdict in her favor.

We think that the case as here stated does not show a case of occupational disease, but does show that the decedent came to his death by accidental causes, and upon the authority of *Industrial Commission v. Roth*, 98 Ohio St., 34 (120 N. E., 172), the judgment in favor of plaintiff will be affirmed.

Judgment affirmed.

VICKERY and SAYRE, JJ., concur.

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Hamilton County.

STATUS OF ACTION BY ALIEN ENEMY.

Court of Appeals for Hamilton County.

HIRLINGER V. ZANDER, EXRX., ET AL.

Decided, June 30, 1919.

Aliens—Effect on a Pending Suit of the Plaintiff Alien Becoming an Alien Enemy.

A suit properly instituted in a state court by an alien against a citizen of this state will not be dismissed because plaintiff subsequently becomes an alien enemy by reason of a declaration of war between the United States and the government of which he is a subject, but such suit should be suspended during the continuance of the war by continuing the case from term to term until the declaration of peace.

Motion to dismiss petition in error.

Powell & Smiley, for plaintiff in error.*Galvin & Baner* and *Spangenberg & Spangenberg*, for defendants in error.

HAMILTON, J.

Heard on error.

This action was originally filed in the Court of Common Pleas of Hamilton County on February 23, 1917, prior to the declaration of the state of war between the United States and Germany, and the case was pending at the time of the declaration of war. No further proceedings were had in that court until October 4, 1918, when the defendants filed a motion to dismiss the petition, basing their motion on the fact that the plaintiff was an enemy alien, residing in the German Empire. The state of war was declared between the United States and the German Empire April, 1917. Upon consideration of the motion, the court of common pleas sustained the same and dismissed the action at plaintiff's cost.

The reasons set forth in the motion for dismissal of the petition in error are: first, because the plaintiff in error has no

standing or right in law to institute such proceedings or any proceedings in this court, inasmuch as said plaintiff in error is an enemy alien residing in Germany; second, because said proceeding in error was instituted by the attorney claiming to be her counsel without authority obtained from her, or any other person acting in her behalf; third, because such owner of attorney, if any existed, was revoked by the declaration of war, wherefore Attorney Powell is without legal power to represent plaintiff in error before this court, or subject her to its jurisdiction; and, fourth, because the petition in error does not raise any questions which would otherwise invest this court with jurisdiction to review the proceedings in error.

The presentation in the briefs of counsel on motion to dismiss involves all the questions that might be presented on the merits of the case, and the determination of the questions on the motion will determine the merits of the case.

The first question which we will consider is: Did the trial court err in dismissing the petition and rendering judgment for costs against plaintiff? Defendants in error rely upon the act of Congress entitled "Trading with the Enemy Act," and the amendments thereto, which, among other things, provides as follows:

"Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof."

Section 10 relates solely to patent rights, trade-marks and copyright matter.

The suit was filed in the common pleas court by an alien against citizens of the United States prior, to the declaration of war between the United States and Germany and was pending at the time of the declaration of war. These facts bring the case clearly within the rule laid down in the decision of Spear, J., in the case of *Plettenberg, Holthaus & Co. v. I. J. Kalman & Co.*, 241 Fed., 605. The syllabus of that case is as follows:

"A suit, properly instituted in a federal court by an alien against a citizen of the United States, will not be dismissed be-

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cause plaintiff subsequently becomes an alien enemy, by reason of the declaration of war between the United States and the government of which he is a subject, but may be suspended on motion of defendant during the continuance of the war."

It is well settled that our courts are open to alien enemies residing here during the continuance of the war. *Nyitray v. McAlonan*, 27 C. C. (N. S.), 545, and cases there cited. It is also well settled that an alien enemy residing in an enemy country could not properly institute a suit against a citizen of the United States, during the continuance of the war. *Porter v. Freudenberg* (1915), 1 K. B. 857, and cases therein cited.

The plaintiff in error, a German subject, sued to set aside a will of a deceased relative, a resident of this country. She brought her action and it was pending before the German government was at war with the United States. There are strong legal inhibitions against the commencement or maintenance during the war of a suit or action by an alien enemy, the inhibition being provided for by the act entitled "Trading with the Enemy Act," above referred to. The reason for this is that if the alien enemy through the action should recover property it might add to the resources of the power of which he is subject, then at war with this country, in whose court he seeks redress. The inhibition is, however, co-extensive only with the war. It does not abate an action or suit begun while the courts are open to aliens. The law of the land extends judicial power to controversies between aliens and citizens of the United States. The action instituted before war was declared was properly brought. At the time of the institution of the suit plaintiff was not an enemy alien, but afterwards became such.

In the case of *Watts, Watts & Co. Ltd. v. Unione Austriaca di Navigazione*, 248 U. S., 9, the court say at page 22 of the opinion:

"Under these circumstances, we are of opinion that the decree dismissing the libel should be set aside and the case remanded to the District Court for further proceedings, but that no action should be taken there (except such, if any, as may be required to preserve the security and the rights of the parties

in *statu quo*) until, by reason of the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become possible for the respondent to present its defense adequately."

Our conclusion, therefore, is that the action should not have been dismissed by the trial court, but merely suspended during hostilities by continuing the case from term to term until the declaration of peace.

The objection on the ground that the attorney was without authority to prosecute this proceeding in error is disposed of by the holding in *Porter v. Freudenberg*, and in the *Watts case*, *supra*, where the exception is made that no further proceedings should be taken by the lower court during the continuance of hostilities "except such, if any, as may be required to preserve the security and the rights of the parties in *statu quo*" until the restoration of peace.

In the case of *Pennywit v. Foote*, 27 Ohio St., 600 (22 Am. Rep., 340), the court say, at page 631:

"Numerous cases may be cited to show that agencies in private affairs, relating to property of an alien enemy, within the agent's country, so far as their acts are not in violation of the non-intercourse regulations, and are not for the benefit of his principal, or protection of his property, are not revoked. We have been referred to none, however, showing that such agencies extend beyond the protection and care of his principal's property and interests, to the creating new obligations. The attorney in this case might well have continued his employment, for the purpose of saving the rights of his clients; but it can hardly be claimed that it was within the scope of his employment to waive his clients' right to have the action suspended, and, by his appearance, confer a power upon the court, which otherwise it did not possess, to bind them by a judgment, when war made it impossible for him to have a day in court."

The original suit was filed by counsel who now file this petition in error, and it was not only their right to file the petition in error, to protect the interest of their client against a dismissal of the action, but it was their duty to do so. While their authority to act is limited to such acts as may be required

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to secure the rights of the plaintiff in error and maintain a *statu quo* with reference to the suit, the proceeding in error here does no more than that. For the same reason the plaintiff in error had the right and standing in law to institute this error proceeding, but for the sole purpose of maintaining her suit *in statu quo* in the trial court pending the continuance of hostilities.

For the reasons above stated the motion to dismiss the petition in error will be overruled.

The judgment of the trial court will be reversed, the judgment of dismissal set aside, and the trial court instructed to suspend the action until the conclusion of peace between the United States and Germany.

Judgment accordingly.

SHOHL, J. concurs. CUSHING, J., not participating.

DUPLICITY OF NAMES AS AFFECTING TITLE.

Court of Appeals for Cuyahoga County.

NOVOGRODER ET AL V. DI PAOLA ET AL.

Decided, July 7, 1919.

Title—Clouded by Duplicity of Names—Specific Performance Denied and Contract for Purchase and Sale Canceled.

Two names were used by an owner of real estate, one as grantee of the premises in question and the other as vendor and grantor.

Held: Such duplicity of names constitutes such a cloud upon the title that the owner will be refused specific performance of a contract to sell such premises, where the contract called for a title free from clouds.

Scott, Bissell & Waterworth, for plaintiffs.

B. D. Nicola, contra.

Heard on appeal.

DUNLAP, J.

This cause is here upon appeal. The suit as originally started was for an injunction to restrain the recording of deeds and asking for a cancellation of a certain contract for the transfer of lands. It resolves itself by virtue of the pleadings into a suit for specific performance, and we shall here treat the case as such a suit, the cross-petition of the defendants, Santo Di Paola and Angelina Di Paola, becoming virtually the petition in the case.

It will be sufficient for the purposes of this opinion to state that the answer to this cross-petition sets up as a defense that the Di Paolas are unable to carry out the terms of the contract in the respect that they are unable to comply with that provision of the contract which required the furnishing of a certificate of title showing the property free from encumbrances, liens and clouds, excepting certain specified mortgages.

The contention of Novogroder that a certain lease stands as a cloud upon the title, or did so stand at the time he filed his petition, is, we think, not well taken. Its cancellation was secured, as we think, within the time provided by the contract, with the extensions agreed upon, and this cloud upon the title was entirely removed before the filing of the cross-petition seeking specific performance. It had disappeared as completely as had the liens of certain judgments, which also required similar cancellation before they ceased to be clouds. While in our opinion this canceled lease gives rise to no bar to the granting of relief which a court of equity would be unable to pass, yet we do find a bar to the granting of this relief in another feature of this cause.

Di Paola, as the evidence shows, is a very illiterate man. One of his properties, which, by this contract, he was to exchange, was bought by him several years ago. He could not write his own name. He had learned from some one to write a very simple name, the name of "D. Sam," and finding it a convenient one he adopted that name for his business dealings, and when he bought this property took it in the name of "D. Sam." Nothing of this kind, however, showing the identity of D. Sam

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and Di Paola, appears upon the court or other records of this county. Later, he used his own name, Di Paola. The contract is drawn in the name of Di Paola without revealing that part of his property is in the name of D. Sam. Naturally, the abstract company was unable to certify that the property was in the name of Di Paola when it was in the name D. Sam, and an attempt was made to meet this difficulty by the drawing of a deed in which the name of the grantor appears as "Di Paola, sometimes known as D. Sam," the deed being signed "Di Paola."

In this shape the deeds from Di Paola to Novogroder were placed in escrow awaiting the time that the abstract company could certify the title to be in Di Paola, free and clear of all encumbrances, liens and clouds whatsoever, etc. While the trusted attorney for both parties knew that D. Sam and Di Paola were one and the same person, and was doubtless prepared to establish this fact in a court of equity, can it be said that this fact, unestablished by any court and not shown by any record at the time this cross-petition for specific performance was filed, did not constitute a cloud upon the title? It may be granted that the attorney who was entrusted with this work by both parties knew the fact, but his mere recital in the deed does not establish the fact. Under this situation the abstract company, as we have stated, would have found it impossible to certify this property in the name of Di Paola. Unquestionably a cloud here existed which has not been removed up to this day. If removed at all, it has only been by virtue of the evidence in the case as heard by this court. Bearing in mind that this suit was not brought for the purpose of quieting title or removing clouds, and that the equities of this case are to be determined as of the date of the filing of this suit, or at least as of the date of the answer and cross-petition asking for specific performance, have the Di Paolas done sufficient in the way of tendering deeds free from clouds to entitle them to specific performance?

This contract was peculiarly worded; but it is not the province of the court to make contracts, but to enforce them. It is true that Novogroder may be captious, and his lawyers and his present counsel may be hypercritical, but if he contracted

for a cloudless title he has a right to have a cloudless title. "D. Sam" looms as a cloud upon the horizon. Di Paola can not, by his mere word that he is D. Sam, contained in the deed, remove that cloud.

Such holding by a court of equity would be the establishment of a dangerous precedent, the dangers of which should be apparent and need not be pointed out. The grantee of property under this contract does not have to take such a deed simply because it is tendered. It is true no one rises up to claim the property as "D. Sam." It is true that in this case Di Paola swore that he was "D. Sam," but this only serves to accentuate the fact that this use of a name is a cloud upon this title, because it required evidence in a court to show that Di Paola and D. Sam were one and the same individual. The distinction between a cloud upon title, and an encumbrance to title must at all times be borne in mind. Thus, some of the definitions of a cloud upon title are as follows:

"A cloud upon title is a title, or incumbrance, apparently valid, but in fact invalid." *Bissell & Adams v. Kellogg*, 60 Barb. (N. Y.), 617, 629; *Teal v. Collins*, 9 Ore., 89, 92, and *Goodkind v. Bartlett*, 136 Ill., 18, 21 (26 N. E., 387).

"A cloud upon one's title is something which shows *prima facie* some right of a third person to it." *Waterbury Savings Bank v. Lawler*, 46 Conn., 243, 245.

"A cloud upon a title is but an apparent defect * * * the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is * * * a cloud upon his title which the law should recognize and remove." *Whitney v. Port Huron*, 88 Mich., 268, 272 (50 N. W., 316).

"A cloud on title is a title or encumbrance apparently valid, but in truth invalid. The test is: If an action should be brought based on the claim shown by the cloud, would the owner of the property have to offer evidence to defeat the claim?" *Haggart & McMasters v. Chapman & Dewey Land Co.*, 77 Ark., 527 (92 S. W., 792; 7 Ann. Cas., 333); *Pixley v. Huggins*, 15 Cal., 127, and *Dailey v. Koeppele*, 164 Ala., 317 (51 So., 348).

Where extrinsic facts are required to show invalidity, a cloud

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on title exists. *Allott v. American Strawboard Co.*, 237 Ill., 55 (86 N. E., 685).

In our opinion the situation presented by the case at bar discloses a cloud if the authorities which we have here quoted shall have weight in the consideration of this case. If this suit were based on a contract requiring simply a marketable title, the question which we would have to solve would be different. We do not feel like forcing this title on to the plaintiff in this case by the exercise of the equitable power of the court. We do not think we ought to force upon him the possible necessity of defending this title, and perhaps establishing at some future time that Di Paola and D. Sam are one and the same person. We think that when Di Paolas filed their answer and cross-petition asking for specific performance, such a condition existed that Novogroder had a right to refuse this title because of the existence of a cloud thereon, which was not removed, and because the deed tendered was not in accord with the contract.

For this reason specific performance will have to be refused and the prayer of the petition asking for a cancellation of the contract will be granted, the defendants to pay the costs.

Judgment for plaintiffs.

WASHBURN and VICKERY, JJ., concur.

TRANSACTIONS BETWEEN CORPORATIONS HAVING COMMON BOARDS OF DIRECTORS.

Court of Appeals for Lucas County.

(Shohl, P. J., Hamilton and Cushing, JJ., of the First District, sitting by designation.)

TRUMAN v. COGHLIN MACH. & SUPPLY CO. ET AL.

Decided, June 30, 1919.

*Corporations—Dealings Between, Where Under Control of the Same
Individuals—Subject to Scrutiny and Must be Based on Good Faith
—Fee to Attorney of Stockholder.*

1. Directors of a corporation must deal with it in the utmost good faith, and when two corporations have a majority of directors in

common, transactions between them are subject to scrutiny and are sustained only if they are fair and made in good faith.

2. Such transactions are not illegal if the terms are fair.
3. When a stockholder brings suit on behalf of the corporation, and thereby brings a fund to it, the court may order his attorney fees paid from such fund.

Rupert Holland and John O. Zabel, for plaintiff.

Fritsche, Kruse & Winchester and Alex. L. Smith, for defendants.

SHOHL, J.

Heard on appeal.

This case is here on appeal. Plaintiff, a stockholder in The Francis Machinery Company, brought this action on its behalf against the Coghlin Machinery & Supply Co., and William Coghlin and James A. Kirkby, its principal officers. Truman originally had a one-half interest in the Toledo Auto Tool Co. Defendant Coghlin was president, general manager, treasurer and the chief stockholder of the Coghlin Machinery & Supply Co., a corporation engaged in selling tools and supplies. Kirkby was also an officer, and they and their wives were all the stockholders. Among their customers was the Foster Machine Co. of Elkhart, Indiana. In 1915, Mr. Coghlin was at Elkhart, when the Foster Machine Co. wanted to have him manufacture for them certain box tools which they needed, stating that they were willing to pay 87½ per cent. of their list price. Coghlin then returned to Toledo and took the matter up with Truman and others. There is a conflict of testimony as to the precise agreement between them. The court finds that in substance there was a verbal contract between the Coghlin and Truman companies for 100 of these box tools.

Truman was associated with one Rakestraw, and thereafter Coghlin acquired Rakestraw's interest in the Auto Tool Co. Truman then sold him 10 shares more, 5 of which he gave to Kirkby, so that the plaintiff had 40 per cent. of the stock, Kirkby 5 per cent., and Coghlin, 55 per cent.

The Auto Tool Co. was annoyed by claims that were being made against it, so it was decided to incorporate a new com-

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pany. Accordingly the Francis Machinery Co. was incorporated under the laws of Ohio, and it purchased all the assets of the Toledo Auto Tool Co., which ceased to do business. There is nothing in the corporate records of the Francis Machinery Co. that establishes that it assumed the obligation of the Auto Tool Co., in respect to the agreement to manufacture the box tools for the Coghlin Company. Coghlin became president, general manager and treasurer of the Francis Machinery Co., as well as director, elected a majority of the directors, and was thus the controlling factor in that concern as well as in the Coghlin Company. The business was carried on for eight months and tools were manufactured under the direction of Truman, the plaintiff, who was a practical machine tool manufacturer. They were taken to the Coghlin company and billed to it on the basis of the original figures given by Truman to Coghlin at the outset of the whole transaction, about January 12, 1916. Truman received a drawing account of \$31.25 a week. The company made certain profits, aggregating about \$6,000, which were declared in dividends. The Coghlin company, however, was making large profits, which the record shows aggregated over \$27,000, by the sale of the product to the Foster company and others. When Truman learned of the large profits that were being made, he demanded that the Francis Machinery Co. be given an accounting for them, which was denied.

A chattel mortgage in the sum of \$5,398.11 was given by the defendants for the Francis Machinery Co. to the Coghlin Machinery & Supply Co. to secure the purchase price of certain machinery. They then procured the ratification of this action by the Francis company through their control of it. Ultimately a sale was had and the Coghlin company bought in the mortgaged property for \$3,000.

Plaintiff made due demand upon the directors of the Francis Machinery Co., and, failing to secure corporate action, brought suit on its behalf.

It is elementary that the directors owe their corporations the duty of dealing with them in the utmost good faith. (*Thomas v. Matthews*, 94 Ohio St., 32, 43.) And where two corporations

have a majority of their directors in common, transactions between them are subject to scrutiny, and are sustained only if they are fair and made in good faith. *McGourkey v. Toledo & O. C. Ry.*, 146 U. S., 536, 552 (36 L. Ed., 1079; 13 Sup. Ct., 170); *Wardell v. Railroad Co.*, 103 U. S., 651, 658 (26 L. Ed., 509); 3 Cook, Corporations (7 Ed.), Sec. 658, and 2 Thompson, Corporations (2 Ed.), Sec. 1242. See also 2 Machen, Corporations, Secs. 1563-1606.

The dominant position which the director William Coghlin occupied toward both of the corporations imposed upon him the obligation to see that the Francis Machinery Co. was treated fairly in the dealings with his other company.

It is true that at the time the original contract was made between the Coghlin company and the Toledo Auto Tool Co., he had no connection with the latter. However, most of the merchandise was sold after he had acquired his interest and had become a director in the Francis company. That corporation was intended to be and was a distinct legal entity from the Auto Tool Company, the assets of which it purchased. So far as the record shows it did not assume its obligations. If it did assume the obligation to fulfill the contract, it was only by virtue of some action taken after Coghlin acquired control and when his duty to protect it had already arisen by operation of law. There is no foundation whatever for a claim that the Francis company was obligated to sell any tools after the 100 of each type called for by the oral contract of the Auto Tool company. As to all later sales it stands admitted that Coghlin controlled both parties.

Plaintiff contends that it is entitled to all the profits made. As to the \$4,990 worth of tools delivered by the Toledo Auto Tool Co. prior to April 17, 1916, when the Francis Machinery Co. began to do business, plaintiff is not entitled to relief. Furthermore, plaintiff's contention overlooks the fact that it was the Coghlin Machinery & Supply Co. that procured the agreement with the customer and carried out all negotiations with it. The transactions were not sales by the Francis Machinery Co. to the Foster Machine Co. but were purchases by the

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Coghlin Machinery & Supply Co. of goods to be sold at a profit to the Foster company. There is nothing necessarily illegal in a purchase by the Coghlin Machinery & Supply Co. from the Francis Machinery Co., provided that the prices were fair.

We are of opinion therefore, that the Coghlin Machinery & Supply Co. is not without right with respect to the profits that accrued in the transaction. Upon consideration of all the evidence, facts and circumstances, the court finds that the Coghlin Machinery & Supply Co. and the Francis Machinery Co. are each entitled to one-half of the profits accruing out of the business in question after April 17, 1916. It follows, therefore, that, at the time the chattel mortgage was given, The Francis Machinery Co. was entitled to substantial credits, which had not been allowed it, and that the mortgage and sale pursuant thereto should be set aside.

Defendants have stated their willingness to account for the value of everything which was realized out of the liquidation of the Francis Machinery Co., and when this is carried out the proper result will be accomplished.

The plaintiff, therefore, is entitled to an accounting between the Francis Machinery Co. and the Coghlin Machinery & Supply Co. to ascertain the amount of profit made by both concerns in their transactions. One-half of the profits will be awarded to each.

In cases of this kind, plaintiff having procured a fund for the Francis Machinery Co., it is proper that an attorney fee should be allowed him to defray his expenses of litigation, which said fee should be paid by the Francis Machinery Co. (Cook Corporations, Secs. 748, 879.) The court will reserve jurisdiction to fix the amount on further hearing.

In view of the fullness of the evidence in respect to the profits made, if counsel can arrive at an agreement in respect to the results, it will not be necessary to appoint a master to take an accounting. If counsel are unable to agree, each side may present such entry as accords with its views, based upon this opinion.

Judgment accordingly.

HAMILTON and CUSHING, JJ., concur.

AS TO THE FILING AND USE OF DEPOSITIONS.

Court of Appeals for Lucas County.

CURRIER V. TOLEDO (CITY).

Decided, December 16, 1918.

Depositions—Duty of Officer Taking—Available for Use of Either Party, Subject to Competency and Relevancy.

By virtue of the provisions of Section 11538, G. C., the officer before whom a deposition is taken must transmit the same to the clerk of court, and the deposition becomes when taken, whether filed or not, an official document under control of the court and may be used by either party according to its competency or relevancy.

Marion W. Bacome, for plaintiff in error.

Ralph Emery, Director of Law, and *Charles T. Lawton*, Assistant Director of Law, contra.

RICHARDS, J.

Heard on error.

The plaintiff, Catherine Currier, brought this action against the city of Toledo to recover damages for personal injuries claimed to have been suffered by her by reason of a defect in a sidewalk. The defendant duly served notice to take plaintiff's deposition and the same was taken before a notary public in the city, the plaintiff appearing not only in person, but by counsel, who, after she had been examined by counsel for the city, also propounded questions, which were answered by her. It is not very clearly shown whether the notary was paid his fees for taking the deposition, but after the same was transcribed he filed the same with the director of law of the city. Having voluntarily delivered the same to counsel for the city it is unimportant so far as this case is concerned whether his fees were paid or not. The deposition was never filed in the common pleas court, where the action was pending. Some time after the deposition was taken plaintiff died, and an administrator was ap-

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pointed and the action revived in his name. Counsel for plaintiff on learning that the deposition had not been filed in court proceeded by various motions in an attempt to procure an order of the court requiring the same to be done, but his applications were overruled. Thereupon the action came on for trial and plaintiff was not permitted to require production of the deposition, nor to obtain an inspection of the same, nor to prove its contents other than in the general way of a statement that it tended to substantiate the right of the plaintiff to a recovery. It seems that at the time of the injury of Catherine Currier she was the only one present, and perhaps the only one whose testimony would be valuable in showing the circumstances under which she was injured. The trial court rendered a judgment in favor of the defendant and this proceeding in error is brought to secure a reversal of the same.

The city contends that as the deposition was taken under a notice served by it, and as the deposition was never filed, it is a private paper belonging to the city and not under the control of the court. We can not assent to this contention. By the provisions of Section 11538, G. C., the officer before whom a deposition is taken is required to transmit the same to the clerk of the court where the action is pending, and in the performance of his duty the notary who took this deposition should have filed the same in the court of common pleas. Having delivered the same to counsel for defendant the document still remained an official one and under the control of the court. The rule is so stated in various textbooks and authorities, and, indeed, we know of no authority permitting the party who causes a deposition to be taken to retain the same from the files in the absence of a statute authorizing such action. We call attention to 13 Cyc., 963, where it is said that neither the commissioners nor the parties have the right to retain depositions. The rule is stated as follows in 6 Encyclopedia of Pleading and Practice, 632:

“The officer before whom a deposition is taken is not the agent of either party, but must act for all parties alike, being the officer of the court, and when the deposition is regularly taken it is for the use of either party according to its competency and relevancy.”

See also 4 Encyclopedia of Evidence, 476.

The question was directly before the court in *First Nat. Bank v. Forest*, 44 Fed., 246, in which case a decision was rendered by Shiras, J., fully considering and discussing the contentions of counsel on both sides and reaching the conclusion that a deposition when taken is not under the control of the party at whose instance it was taken and that an order should issue requiring that it be filed in court. The officer before whom a deposition is taken is acting as an officer of the court and is supposed to be impartial as between the parties. The same ruling is made in a case entitled *In re Rindskopf*, 24 Fed., 542; in *Mott Iron Works v. Standard Mfg. Co.*, 48 Fed., 345; and in *Bennett v. Williams*, 57 Pa. St., 404.

The contentions made by the city have undoubtedly been made in good faith and we have no doubt that counsel on learning the construction placed by the court on the Ohio statute will be glad to comply with the ruling and file the deposition in court.

The trial court was in error in holding that the deposition was under the control of the party who had caused the same to be taken.

Judgment reversed and cause remanded for further proceedings.

CHITTENDEN and KINKADE, JJ., concur.

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EFFECT OF RELEASE FROM INJURED MAN ON ACTION FOR THE INJURIES SUSTAINED.

Court of Appeals for Lucas County.

(Shohl, P. J., Hamilton and Cushing, JJ., of the First District, sitting by designation.)

AFFIELD V. PAIGE DAIRY CO.*

Decided, July 13, 1919.

Actions for Personal Injuries—Void Release Without Effect—Voidable Release Must be Set Aside Before Action for Injuries in, Brought—Fraudulent Application for Workmen's Compensation—Whether Applicant Possessed Mental Capacity a Question for the Jury.

1. Where a release of a cause of action for damages for personal injuries is void, it is not a bar to such an action, and the plaintiff may, if it is set up by answer as a bar to his right of action, by reply aver the facts that make it void; but if it is not void, but only voidable, he can not maintain his action until such release is set aside.
2. A fraudulent and void application for compensation from the state insurance fund, executed by one employee while mentally incapacitated and filed without his knowledge or consent, does not bind such employee or confer jurisdiction upon the industrial commission.
3. In an action brought under the provisions of Section 1465-76, General Code, the question of mental capacity to execute an application for compensation from the state insurance fund is one of fact for the jury under proper instructions from the court. (*Perry v. O'Neil & Co.*, 78 Ohio St., 200, and *Brown v. Kiechler Mfg. Co.*, 98 Ohio St., 440, approved and followed.)

Heard on error.

Charles A. Thatcher, for plaintiff in error.*Marshall & Fraser* and *Stephen Brophy*, for defendant in error.

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 21, 1919.

HAMILTON, J.

This is an error proceeding seeking to reverse and set aside a judgment of the Court of Common Pleas of Lucas County, Ohio, dismissing the plaintiff's petition.

A brief history of the case and the different steps taken is necessary for an understanding of the issues involved.

Frederick H. Affield, the plaintiff in error, was employed as a workman in the automobile repair department of the defendant. While engaged as such workman he was injured in an elevator accident in the establishment of the defendant, on August 4, 1917.

The defendant company employed more than five men and paid a premium to the state insurance fund. A few days after the injury an application for compensation out of the state insurance fund was signed by Affield and filed with the Industrial Commission of Ohio. On January 10, 1918, following, Affield filed an application with the Industrial Commission for leave to withdraw his application for compensation, claiming that he had no knowledge of the signing and the filing of the application; that he was not in a mental condition to understand what he was doing and that the signature had been fraudulently procured and was filed with the commission without his knowledge; and that he was without mental capacity to understand the application and its purport. Affidavits on the question were filed with the commission by both the plaintiff and defendant, and the consideration of the commission resulted in a refusal to permit the plaintiff to withdraw his application, finding him to be mentally responsible at the time of the signing and filing. Affield, thereupon, appealed to the court of common pleas from the finding of the commission refusing permission to withdraw the application. The court held it was without jurisdiction in the premises and dismissed the appeal. No further action was taken on the question of the withdrawal of the application, or on the finding of the court of common pleas dismissing the appeal for want of jurisdiction.

July 27, 1918, plaintiff, ignoring the application or any proceeding theretofore had, filed his petition in the Common Pleas

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Court of Lucas county claiming damages from the defendant company on account of the injuries claimed to have been received while in the employ of said company at their place of business, and averring the violation of the law in the maintenance of the elevator without proper safety devices, and in the failure to post notices of their having paid the premium in the state insurance fund. The defendant company answered, and in their first defense set up the application by Affield for an allowance from the state insurance fund on account of his injuries, and all the proceedings relative to the application for leave to withdraw by Affield, claiming these proceedings and the application to be a bar to the prosecution of the suit in the common pleas court. In the second defense they answered to the merits.

The plaintiff thereupon filed a reply, averring, among other things, that after receiving the severe injuries of which he complains in his petition he was removed to a hospital, and that while there confined an employee of the defendant whose name he is informed is William Michaelis called upon the plaintiff and told plaintiff that he wished to make a report of the fact that plaintiff had been injured; that said person did not tell plaintiff to whom this report was to be made and did not read said report to plaintiff; that at said time plaintiff was suffering great mental and physical distress because of the injuries which he received, and was not mentally capable of transacting business of any kind or character; and that said Michaelis wrote matters upon a piece of paper, the nature and extent of which plaintiff does not know, and told plaintiff that it was simply a statement of the fact that he was injured, and induced plaintiff to sign his name to said paper.

The plaintiff further says that "his signature to said paper was procured fraudulently and by the substitution of another paper for the one which said Michaelis told plaintiff he was signing, and plaintiff is informed and believes and therefore avers that said paper which he so signed purports to be an application for compensation under the state insurance law; that his signature was procured to said paper for the purpose of de-

ceiving and defrauding him out of his just rights, and that he did not know and had no means of knowing the contents of the same, and was misled, deceived and tricked into signing said paper; that the mind of plaintiff and the said Michaelis did not unite upon any agreement upon the part of the plaintiff to sign a paper purporting to be an application for compensation, and that the same is wholly null and void, and of no binding effect upon plaintiff."

When the case was called for trial the defendant company moved the court that the cause be first tried and submitted to the court upon the first defense of the defendant's answer, without the intervention of a jury, to which plaintiff objected. Thereupon, the court granted the defendant's motion, to which plaintiff at the time excepted. Thereupon, the plaintiff moved that a jury be called to try this cause, which motion the court overruled, to which plaintiff at the time excepted.

The cause was submitted to the court upon the petition of plaintiff, the first defense of the answer, and the reply, without the intervention of a jury. Upon consideration, the court found Affield to be mentally competent when he made the application, and that by filing the same with the Industrial Commission he elected to take compensation out of the state insurance fund; that no fraud or deceit was practiced upon him and he was bound by his action so taken; and that the application for compensation is a bar and a defense to the present action. The court thereupon dismissed the petition. Motion by plaintiff for a new trial was overruled and exceptions noted, and the case is brought into this court for review both by appeal and error.

Plaintiff in error urges, as grounds for reversal, error of the court in hearing the cause on the petition, the first defense of the answer, and the reply, without the intervention of a jury; and that the finding of the court was against the weight of the evidence.

It is urged by the defendant in error that the action before the Industrial Commission finding the application properly executed and filed, and finding that Affield was mentally capable of executing and filing the paper, and that no fraud was prac-

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ticed upon him, was a final determination of the rights of the plaintiff, and in support of that proposition defendant in error cites Sec. 1465-90, G. C., which provides:

“The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.”

Section 1465-76, G. C., provides:

“Such injured employe * * * may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury; and *such employer shall not be liable* for any injury to any employe * * * except as provided in this section; * * *.

“Every employe * * * who makes application for an award, or accepts compensation from an employer who elects, under Sec. 22 of this act, directly to pay such compensation waives his right to exercise his option to institute proceedings in any court, except as provided in Section 43 hereof?”

This action is not one of the exceptions in Section 43. The law is unambiguous and clear that if the plaintiff filed an application with the Industrial Commission for an allowance from the state insurance fund he can not maintain this action. And it is further clear that to give the commission jurisdiction in the premises a valid application must be filed. If the commission had jurisdiction under the provisions of the law, its findings would be final. In his reply in this case the plaintiff denies the signing and execution of the application, and denies the filing of the same, and avers the application was not read to him; that he was told it was a report of the injury; and that at the time he was suffering great mental and physical distress because of the injuries which he had received and that he was not mentally capable at the time of transacting business of any kind or character; that he did not know and had no means of knowing the contents of the application; and that his signature was procured thereto fraudulently and that the application is wholly null and void. These averments, if true, show the application to be void and of no effect, and such a paper filed with the Industrial Commission could not confer jurisdiction on the com-

mission to take any action in the premises, and could have no more binding effect on the plaintiff than if the application had not been made. This being true, the plaintiff had the right to maintain an independent action, ignoring wholly any proceeding before the Industrial Commission.

Finding the plaintiff to have the right to maintain an independent action, disregarding any proceeding before the Industrial Commission, the remaining question is, Did the common pleas court err in hearing the matter on the petition, the first defense of the answer, and the reply, involving the mental capacity of the plaintiff, without the intervention of a jury? In the case of *Perry v. O'Neil & Co.*, 78 Ohio St., 200, the first paragraph of the syllabus is:

“A release of a cause of action for damages for personal injuries, that is void, is not a bar to such an action, and the plaintiff may, if it is set up by answer as a bar to his right of action, by reply aver the facts that make it void; but if it is not void, but only voidable, he can not maintain his action until the release is set aside.”

The question then turns on the proposition as to whether or not the application was void or only voidable. While there are some averments in the reply which would tend to make the application only voidable, other averments would show the same to be absolutely void. The averments that the plaintiff did not know what he was signing, that he was without mental capacity to transact any business at the time of the signing of the application, are facts, which, if proven, would show the application not voidable, but void, and were proper averments, upon which the plaintiff was entitled to have the consideration of a jury. In the case of *Brown v. Kiechler Mfg. Co.*, 98 Ohio St., 440, decided by the Supreme Court of Ohio the 19th day of March, 1918, the Supreme Court on reversing the Court of Appeals of Hamilton County, Ohio, held that the mental capacity of the plaintiff to contract at the time he signed the paper writing purporting to be a release, as set forth in the answer, is a question of fact, to be determined by a jury under proper instructions, citing the case of *Perry v. O'Neil & Co.*, *supra*, with approval,

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and remanded the cause to the Superior Court of Cincinnati, Ohio, for further proceedings and trial according to law.

We are of the opinion that the instant case is clearly within the rules laid down in the cases of *Perry v. O'Neil & Co.*, and *Brown v. Kiechler Mfg. Co.*, *supra*, and that the trial court erred in hearing and determining the case as it did, and for this reason the judgment is reversed, and the cause remanded for further proceedings and trial according to law.

Judgment reversed and cause remanded.

SHOHL and CUSHING, JJ., concur.

**QUESTION OF NEGLIGENCE WHEN AN INTOXICATED WOMAN
WAS STRUCK BY A STREET CAR.**

Court of Appeals for Cuyahoga County.

CLEVELAND RAILWAY V. NICHOLSON.*

Decided, July, 1919.

Negligence—Automobile Stalls on Street Railway Track—Intoxicated Woman Attempting, in the Darkness and Rain, to Crank It—Is Struck by a Street Car—Application of Doctrine of Last Chance—Contributory Negligence a Question for the Jury—Charge of Court.

1. Every person is required to exercise ordinary care in the avoidance of danger, and voluntary intoxication is no excuse for failure to perform such obligation.
2. Where in a street railway accident the injured party was prior to and at the time of such accident under the influence of liquor, it is a question for the jury whether or not such party under the circumstances exercised or was capable of exercising ordinary care.
3. Where such party remains on the track in front of his or her automobile, with full knowledge of the approach of an electric car, such conduct constitutes contributory negligence on the part of the injured party and will bar a recovery.

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 22, 1919.

4. The doctrine of the "last clear chance" applies only where a party saw or by the exercise of ordinary care could have seen the injured party in time to have prevented the accident.
5. Where the issue of contributory negligence is presented either by the pleadings or the evidence, or both, such issue should be submitted to the jury under proper instructions from the court.

Squire, Sanders & Dempsey, for plaintiff in error.

Howell, Roberts & Duncan, for defendant in error.

VICKERY, J.

This cause comes into this court on a petition in error to the Common Pleas Court of Cuyahoga County, to reverse a judgment in the sum of \$2,000 obtained by Clara Nicholson against the Cleveland Railway Company. Various errors are alleged as reasons why such judgment should be reversed, but only three have been really urged in this court in oral argument; they are, first, the verdict is not supported by sufficient evidence; second, error in the charge of the court; and, third, the refusal of the court to charge as requested by the railway company.

The action arose in this way: Mrs. Nicholson, on the day of the injury, started out with a friend, Mrs. Garnhart, in a Ford automobile, to visit some friends on the west or south side of the city, and they stopped several times on their way at various saloons, where they drank whiskey and beer, and when they reached their destination they were regaled with more whiskey and beer. Eventually they started home, but it was after dark and was raining very hard. When they reached a point on Scranton avenue, on the south side of the city, the automobile became stalled on the tracks of the railway company. The record shows that one of the characteristics of a Ford automobile is that when it is stalled, the electric lights go out. This automobile, not being equipped with oil lamps, then stood on the tracks in the midst of a heavy rain, at night, in total darkness, except what might have come from the street lamps, and just where the lamps were located and how much light they reflected upon this particular spot is a matter of dispute. But while the automobile was in this position a Cleveland Railway

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car turned on to Scranton avenue from Clark avenue, coming toward the place where the automobile was stalled, in the dark, and ran into it and smashed it somewhat, and the plaintiff, having alighted from the automobile in order to crank it, and being in front of it, was injured also, which accident, both to the automobile and to herself, resulted in the suit at bar and the judgment which is sought to be reversed.

Different minds might disagree as to whether the evidence was such as would warrant the verdict, and we might not be able to say that it was error in the trial court not to have granted the motion for a new trial, nor are we able to say that there was error in the general charge of the court. It is claimed that it was insidious and insinuating. If it was, it must have been in the tone of the voice of the trial judge, or else in the manner of emphasizing words, for the charge reads very well, and all the questions touched on were ably handled, and so we can not say that there was error in the general charge; but we think nevertheless the judgment must be reversed for the reasons which we now give.

After the general charge of the court the railway company by its counsel asked the court to give the following:

“1st. If you find that the plaintiff was immediately, prior to and at the time of the collision under the influence of liquor, it will be your duty to take that fact into consideration in determining whether the plaintiff exercised or was capable of exercising ordinary care under the circumstances, and if you find she did not exercise such care, or was not capable of doing so by reason of such intoxication, she was negligent, and if such negligence caused or contributed to cause a collision, your verdict must be for the defendant.”

It will be remembered that the evidence showed that the plaintiff had been drinking quite considerably in the afternoon, and there is evidence in the record to show that at the very time of the accident she showed evidence of at least partial intoxication, and we think under the circumstances this was a proper request, and the court not having taken care of that in

his general charge, this request, or the substance of it, should have been given, and it was error not to have done so.

“Every person is bound to an absolute duty of exercising his intelligence to discover and avoid dangers that may threaten him, and intoxication voluntarily produced can constitute no excuse for a failure fully to perform this obligation. He is bound to exercise his intelligence and activity in full measure, and if it appears that from voluntary drunkenness he has deprived himself of capacity so to do, and that as a result he has suffered an injury, he will be denied legal redress therefor.

* * * The question arising upon this issue is generally one for the jury’s determination. But evidence is always admissible to establish drunkenness at the time of the injury complained of, unless, indeed, it should be conceded or conclusively established that the injured person did everything for his protection that he could have done if sober.” 20 Ruling Case Law, page 127, Section 107, and cases cited.

Now, as to the second request, which was as follows:

“The plaintiff admits that she knew the car was coming, and yet remained in front of the machine where she claimed she was subsequently knocked down by the collision. The court charges you that if you find under these circumstances she was guilty of negligence in so remaining in that position, contributing directly to produce the collision, your verdict must be for the defendant on the question of injury to the plaintiff, and you shall, in that event, award no damages to plaintiff on account of personal injuries.”

We think this request should likewise have been given, for it will appear from the record that the plaintiff admitted that she knew the street car was bearing down on her automobile, and notwithstanding that fact she remained in front of it, trying to crank it, when she had ample time to get into a place of safety and neglected so to do. It will be remembered that the doctrine of the last chance was invoked in this suit, and was charged by the court, and the verdict could be based on no other theory than that of the doctrine of last chance.

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Now the doctrine of last chance could apply, if at all, only so far as injuries to her automobile were concerned, for, if the motorman did or should have seen the automobile standing on the track, there is no evidence that he did or could have seen the plaintiff in front of the automobile; and her admission and the evidence in the record plainly showed that she knew that the street car was coming down on her, and her apparent negligence in thus staying, she having ample time to get away and choosing to stay in a place of impending danger, surely amounted to a continuing act of negligence and the concurring cause of the injury to the extent of her personal injuries. As the petition only asked for \$59 for injuries to her automobile, the greater or almost the entire amount of the verdict must have been for her personal injuries, which, under the record, the jury might have found were the result of her own hardihood and foolishness in staying in a place of danger. Therefore, this second request should have been given.

We understand that the court refused these requests on the theory that as the original answer did not plead contributory negligence the defendant was compelled upon order of the court to set up its grounds of claimed contributory negligence before it was permitted to introduce evidence to show any contributory negligence, and as neither of the grounds set up claiming contributory negligence were the ones called for to make these two requests proper, the court held that the railway company could not avail itself of them. We do not so understand the law. We understand the rule to be, as laid down in *Rayland Coal Co. v. McFadden*, 90 Ohio St., 183, 193, where the court say, in substance:

“But where the evidence shows that both parties are guilty of negligence which contributed to the injury even through the answer is a general denial, the court must properly charge on contributory negligence.”

We think the law of Ohio at the present time may be stated thus:

If contributory negligence is brought into the case, either by the pleadings, or by the evidence when that issue is not raised by the pleadings, contributory negligence must be submitted by the court to the jury under proper instructions from the court. *Latham v. Columbus Ry. & Light Co.*, 8 N. P. (N. S.), 185; *Dory v. Sebald*, 15 N. P. (N. S.), 302; *Cincinnati, H. & D. Ry. v. Levy*, 8 C. C. (N. S.), 353; *Cincinnati Trac. Co. v. Forrest*, 73 Ohio St., 1; *Cincinnati Tract. Co. v. Stephens*, 75 Ohio St., 171; *Glass v. William Heffron Co.*, 86 Ohio St., 70; *Behm v. Cincinnati, D. & T. Trac. Co.*, 86 Ohio St., 209, and *Rayland Coal Co. v. McFadden*, *supra*, and a number of decisions rendered by our own court.

An examination of these authorities will show the law to be as stated above, and if the answer of the defendant only sets out some claims of contributory negligence, and the evidence shows more, surely if the rule be that if there is no pleading the defendant shall have the advantage of contributory negligence when the evidence brings it into the case, then defendant ought not be barred of the advantage of contributory negligence shown by the evidence if he has not been broad enough in his claims in the pleading; particularly must that be so when the court, against the will of a party, compels him to plead something, when under the authorities he might introduce the evidence though no pleading set it up.

Therefore, for failure to give these two requests after argument, or the substance of them, the general charge not having covered the questions raised by these two requests, the case should be and is hereby reversed and remanded to the court of common pleas for further proceedings in accordance with law.

Judgment reversed and cause remanded.

DUNLAP and WASHBURN, JJ., concur.

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Lucas County.

SPECIFIC PERFORMANCE OF CONTRACT TO SELL BEER.

Court of Appeals for Lucas County.

WELKER V. CITY BREWING CO.

Decided, February 24, 1919.

Construction of Provision in Contract Rendering It Void if "the State Goes Dry"—When Such Provision Became Effective.

1. The words "In the event * * * the state of Ohio goes dry" used in a written contract executed in 1917 providing for the sale of beer at wholesale for a period of five years, and stipulating that the contract shall be void on the happening of the above event, will be construed to relate, not to the time the state prohibition amendment was adopted in 1918, but to the time the same was to become effective, to-wit, May 27, 1919.
2. In such a case specific performance will lie to compel a compliance with the contract until the amendment rendered the traffic in intoxicating liquors unlawful becomes effective.

Hackett & Lynch, for plaintiff.*Graves & Stahl*, for defendant.

RICHARDS, J.

Heard on appeal.

The parties to this litigation entered into a written contract on November 10, 1917, by the terms of which the plaintiff, who is operating a saloon in the city of Toledo, agreed to purchase from the defendant not less than 400 barrels of beer per year for a term of five years, the beer to be delivered at his place of business at \$9.00 per barrel, and the defendant agreed to furnish the same to him at the price stipulated and for the time named. The brewing company further agreed to install a suitable set of bar fixtures and to provide certain plumbing and partitions for Welker, all of which was to be paid for by the application on the indebtedness of \$1.00 per barrel of beer delivered.

This action was brought for the purpose of compelling the specific performance of the contract during the time that in-

toxicating liquors may lawfully be sold in Ohio. The common pleas court rendered a decree in favor of the plaintiff, from which decree the defendant appealed to this court. The written contract contains the following clause:

“In the event Rudolph Welker loses his license, or the State of Ohio goes dry, this agreement is to be null and void.”

The parties entered upon the performance of the contract and the defendant delivered to the plaintiff, during the first year of the contract, 399 barrels of beer, pursuant to its terms, which was a substantial compliance for that year.

At the general election held in Ohio on November 5, 1918, there was submitted to the voters the question of adopting a constitutional amendment prohibiting the manufacture and sale of intoxicating liquors as a beverage in the state, and at this election a majority of the votes cast were in favor of such prohibition. By the provisions of the amendment so adopted the same was to become effective on May 27, 1919. The defendant contends that the language quoted from the contract, “In the event * * * the State of Ohio goes dry.” applies to the day of the general election when the electors of the state of Ohio voted in favor of the adoption of the prohibition amendment to the Constitution, while the plaintiff contends that the language quoted refers to the time that the amendment so adopted shall go into effect, which date will be May 27, 1919, and it thus comes about that the interpretation to be placed upon this language of the contract becomes of vital importance. The language “State of Ohio goes dry” is a common expression, often heard, and is an expressive slang phrase, but one not of strict legal accuracy. It can not, of course, be said that Ohio is now “dry,” and it certainly will not legally become so prior to the 27th of May, 1919. To use, before November 5, 1918, the phrase “if Ohio goes dry,” or to use now the expression “that Ohio has gone dry,” could only be interpreted as anticipatory of the approaching drouth, which will not come before May 27, 1919. We think the language used by the parties must be held to refer to the time when the state would become legally “dry,” and that will be the date when the amendment becomes effective.

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Our view on this interpretation is strengthened by the construction which the parties themselves put upon the language before any controversy arose as to its meaning. Beer was furnished by the defendant to the plaintiff under this contract up to the 7th of December, 1918, although it had become apparent, long before that date, that a majority of the voters in Ohio had voted in favor of the adoption of the prohibition amendment. The language used by the parties not being entirely free from ambiguity, the construction which they placed upon the expression used will be given great weight by the courts. 6 R. C. L., 852, Sec. 241; 9 Cyc., 588; *Lentz v. Fritter*, 92 Ohio St., 186, 194, and *the Globe-Rutgers Fire Ins. Co. v. Sherwin-Williams Co.*, 23 C. C. (N. S.), 390.

In view, then, of the language used by the parties and the practical construction placed on the same by the parties themselves, we hold that the time intended and referred to in the contract is the date that the amendment to the constitution will become effective, to-wit, May 27, 1919.

Counsel for defendant insist, however, that the contract is one for the sale of a commodity which can be bought in the market and that such a contract will not be enforced by an order for specific performance. The general rule undoubtedly is that the terms of a contract to furnish ordinary chattels will not be enforced by specific performance, but to this rule there are numerous exceptions. In determining whether the contract at bar comes within the general rule, or within one of the exceptions thereto, attention must be given to the nature of the contract and the peculiar circumstances now existing. By a proclamation of the President of the United States the brewing of beer is now prevented, and the quantity now on hand can not be increased by further manufacture. It is evident that this quantity will constantly decrease between this date and the date when prohibition will become effective. The contract fixes the price at \$9.00 per barrel, and the plaintiff is only able to buy at the present time by paying \$15.00 or \$16.00 per barrel, and the general principles of economics would seem to indicate that as the quantity of the commodity decreases the price may be expected to increase. The plaintiff is not able, at the present time

to supply his trade by beer purchased in the city of Toledo, but is able to do so, at the price of \$15.00 or \$16.00 per barrel, by purchasing the same in Milwaukee. Whether he can continue to so purchase from now on until the traffic shall become unlawful is not apparent, and it can not be shown what price would have to be paid between the present time and the date when prohibition shall become effective. In the event that plaintiff should bring an action for damages at the present time, it would be impossible to show the quantity that he would need to supply his trade. The amount of his damages would be very difficult, if not impossible, of ascertainment, by reason of the peculiar conditions existing. In the event of the plaintiff's inability to procure a supply it would naturally result that he would have to suspend business, and the damage resulting therefrom would be very difficult to assess. Under such circumstances specific performance will lie. The rule has been thus announced in the *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md., 285, which involved a contract for the supply of coal tar produced at the defendant's works during a period of five years.

The rule was applied in *Central Altagracia, Inc. v. Javierre & Gil*, 3 Porto Rico Fed. Rep., 256, which case was one involving a contract to supply to a sugar manufacturing plant, cane growing on a nearby tract, the loss of which would cause the mill to close down; in *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. Rep., 1, where the litigation arose over a contract to deliver oil as produced from oil wells; and in *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass., 92; (26 Am. St. 214.)

The general principle is clearly stated in 3 Pomeroy's Equity Jurisprudence (4 Ed.), Sec. 1401 *et seq.*

It is evident that the contract in the case at bar and the peculiar circumstances existing when construed together constitute an exception to the general rule and that the case is one in which specific performance may lie.

Decree for plaintiff.

CHITTENDEN, J., concurs.

KINKADE, J., dissents.

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Summit County.

CONTROL OF THE PRACTICE OF MEDICINE.

Court of Appeals for Summit County.

SHAW V. STATE OF OHIO. *

Decided, April 30, 1919.

Constitutional Law—Sections 1274-1, et seq. Providing for Registration for Limited Practice of Medicine and Surgery—Not an Unreasonable Exercise of the Police Power.

Sections 1274-1 to 1274-7 General Code, relating to the practice of medicine in the limited branches, are not rendered unconstitutional as being an improper and unreasonable discrimination, or as being an unreasonable exercise of the police power, merely because Section 1288, General Code, provides that the laws relating to the practice of medicine and surgery shall not relate to an osteopath who passes an examination in anatomy, physiology, obstetrics and diagnosis.

Halloway & Chamberlain, for plaintiff in error.

C. G. Roetzel, Prosecuting Attorney, and *W. A. Spencer*, Assistant Prosecuting Attorney, for defendant in error.

DUNLAP, J.

Heard on error.

The plaintiff in error, Fred Shaw, was tried and convicted in the probate court of Summit county, on an affidavit and information charging him with unlawfully practicing medicine and surgery in the state of Ohio without having first obtained a certificate from the state medical board so to do. The judgment of the probate court was affirmed by the common pleas court on error proceedings instituted in that court, and the case brought here on error to review the judgment of the common pleas and probate courts.

The errors complained of in the brief and upon argument relate to the sufficiency of the information, the claim being that

* Affirmed by the Supreme Court, *Shaw v. State of Ohio*, January 13, 1920.

it is defective in form and substance, that the trial court erred in overruling a motion to quash it, and also in overruling a demurrer to the same. The further claim is made that there was error in the refusal of the court to give certain requested charges before argument to the jury.

Some claim is made in argument that the affidavit did not charge the crime with sufficient definiteness to apprise the accused of the nature of the offense. With regard to this claim we are of the opinion that in this respect the affidavit is sufficient, and this claim must be disallowed.

The main contention is that the sections of the General Code relating to the control of the practice of medicine and surgery and the limited branches thereof, Secs. 1274-1 *et seq.* General Code, under which this conviction was had, are unconstitutional, or at least that no proper conviction can be had under them in the present case. We shall not burden this opinion with a quotation of those statutes.

The bill of exceptions taken upon the trial and filed in this case, does not contain the evidence adduced upon the trial. It is simply a statement to the effect that the state to maintain its action gave in evidence certain testimony tending to prove the matters therein set forth, that the defendant gave in evidence certain testimony tending to prove the issues raised by his plea of not guilty, and that at the conclusion of the evidence and before argument the defendant requested the court to give certain instructions in writing to the jury, not as a series, but as separate propositions of law. It then sets forth the instructions so requested. We therefore have no means of knowing whether the proof tended to show that plaintiff in error was engaged in the practice of one or more of the limited branches of medicine, whether it tended to show that he was engaged in the general practice, or as an osteopath. So far as the bill of exceptions discloses, we only know that evidence was offered tending to prove the matters set forth in the information. Consequently we are forced to disregard the statement of the brief for plaintiff in error to the effect that he is an electropath, and therefore practicing one of the limited branches above referred to.

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The argument of counsel for plaintiff in error upon the question of unconstitutionality seems to be directed from the point of view of one practicing one of these limited branches, and the claim is made that the requirements by way of examination for their practice are an unreasonable exercise of the police power of the state.

There seems to exist in the minds of counsel for both parties a slight misapprehension of the meaning and construction of the medical laws of Ohio. Thus, one of the principal arguments of plaintiff in error, and indeed, the principal argument is to the effect that because Section 1288, General Code, provides among other things that the laws relating to the practice of medicine and surgery shall not relate to an osteopath who passes an examination in anatomy, physiology, obstetrics and diagnosis, the law relating to the practice of limited branches is unconstitutional, because of the fact that an examination on many other subjects is required for those desiring to practice what are known as the limited branches, and, osteopathy being also a limited branch, an improper and unreasonable discrimination exists, rendering the law unconstitutional.

This argument is not sound and is not based upon a true premise. Osteopathy is not regarded by the statute, as one of the limited branches of medicine and surgery, but is regarded as purely and simply osteopathy, whatever that may be; nor is it true that the examination provided for applicants for a license to practice osteopathy, in Section 1288, General Code, above referred to, is the only examination required for that purpose. The examination required upon the subjects of anatomy, physiology, obstetrics and diagnosis, provided for in said section, is an examination given by the state medical board, but that examination is not given until after compliance with the provisions of the next section, Section 1289, which provides for a number of very high requirements upon the part of one desiring to practice osteopathy, including evidence of proper preliminary education and a certificate from an osteopathic examining committee to the effect that the applicant has passed a satisfactory examination in pathology, physiological chemistry, gynecology, minor

surgery, osteopathic diagnosis, and the principles and practice of osteopathy. Provision is then made in the next section for the appointment of a state osteopathic examining committee, its organization, etc.

It is quite evident, therefore, that at the time of the passage of the original law, which was in 1902, what was known as the practice of osteopathy had gained considerable foothold in the state. Efforts had been made to prevent its practice, and some of its practitioners had been arrested as unlawfully practicing medicine and surgery under the then existing medical laws. The first of these cases to reach the Supreme Court was the case of *State v. Liffing*, 61 Ohio St., 39. It was then held that the practice of osteopathy did not come within the terms of the existing laws. The law was then amended by the Legislature, but the amendment thus made was held void by the Supreme Court in the case of *State v. Gravett*, 65 Ohio St., 289, for the reason that four years of study were required for the practice of osteopathy, while a less time was required for study of those contemplating the regular practice of medicine and surgery. This was deemed by the Supreme Court as a discrimination and as sufficient reason for holding the amendment unconstitutional.

To meet this situation, the law of 1902 above referred to was enacted. An examination of the legislative records of that session of the Legislature will reveal the fact that at that session of the Legislature the osteopaths of Ohio caused to be introduced into the house of representatives a bill entirely divorcing the respective practices of osteopathy and medicine, and providing for recognition of osteopathic methods of healing and the establishment of a state board of osteopathic examiners entirely separate and distinct from the state medical board. The osteopaths were desirous of obtaining legal recognition to prevent unauthorized and uneducated quacks from assuming to practice osteopathy and also to prevent interference by the medical authorities of the state with what they considered the legitimate practice of their profession.

There was much objection to this proposed law, some of it no doubt being prompted by the more or less selfish desires of the

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medical practitioners, but the solid and enduring argument against the passage of this and all similar laws is and must be that encouragement should not be given to a separation or division of the healing art into schools, to the setting up of one against the other, and to the creation of rivalry among them; that every encouragement ought to be given to an exactly opposite tendency, to-wit, the gathering together under the general head of medicine of all the knowledge of the world concerning the healing art; and that when some discovery of importance is made in this field it should not instantly justify the birth of a new school of healing or therapy, at once seeking to divorce itself from its proper sphere, but should gain its recognition through the constituted medical and scientific channels.

It is not to be wondered at that the Legislature did not sanction this proposal. Had it taken this step, such might very well be regarded as a precedent for the establishment of all kinds of boards, and we would today, in view of the partial recognition that has been given to so-called limited branches, probably have the state medical board, the state osteopathic board, the state chiropractic board, the state electro-therapeutic board, the state mechano-therapeutic board, the state suggestive-therapeutic board, the state Christian Science board, the state board of massage, and perhaps also the state board of chiropody. It is questionable when the process would ever end. As it was in 1902, when what we may call the osteopathic law was passed, these limited branches did not exist, or at any rate were in such embryonic state as to have negligible influence. There was osteopathy, however, not claiming to be a limited branch, but claiming all the dignity of a complete school of healing, and after a short period of existence, embracing, perhaps, a decade, demanding all the recognition and legal sanction which had only just been accorded to medicine after the lapse of thousands of years since the beginning of the world. No, the Legislature was not, and in the nature of things could not be, qualified to grant this demand. It did see fit, however, to go part way. It recognized the existence of the cult and its probable right to exist, and to grow and prosper. It said to the osteopaths: "We don't

understand and your therapy any more than we understand the method of cure by drugs, but we do have certain ideas about what any person and every person who attempts to practice the healing art should at least know and be reasonably informed about. We hold it to be fundamental that your school teaches the same anatomy, the safe principles of physiology and obstetrics that are taught by medicine, and that you recognize the differences between different diseases and recognize the importance of diagnosis. Upon these subjects there can be no glaring difference between medicine and osteopathy. We are not greatly concerned about your method of cure, but we are greatly concerned that you should know what you are about to attempt to cure. We are more concerned that you should properly diagnose the case which you are called to treat than we are about your therapy or method of cure." And so it passed the law of 1902, found in 95 O. L., 212, being now Sections 1286 to 1293, inclusive, General Code.

These sections provide in general terms for two examinations for applicants, one by a board of osteopathic examiners, upon all things which they regard as essential for the practice of osteopathy, and one by the state medical board, on subjects which to the lay minds of the Legislature appeared common and fundamental to all the branches of the healing art. Some slight and immaterial amendments have since been made by the Legislature, but the law in the main still stands as the medical law of the state.

To it has since been added, as the cults or schools began to grow in influence, certain provisions for the practice of the so-called limited branches of medicine or surgery, Section 1274-1 providing for the limited branches of chiropractice, naprapathy, spondylotherapy, mechano-therapy, neuropathy, psycho-therapy, magnetic healing, chiropody, Swedish movements and massage, and then (comprehensively, so as to be done with it, perhaps), "such other branches of medicine or surgery * * * that may now or hereafter exist, except midwifery and osteopathy." The reason for these last exceptions undoubtedly was that laws already existed providing for their practice. All of these limited branches were placed by the law under the control and guidance

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of the state medical board, consistently with the theory conceived by the Legislature in 1902 and permeating the law where provision was made for osteopathy alone. Provision is then made in Section 1274-2 for an examination of applicants for practice in these limited branches, which seems to be perfectly reasonable so far as such applicants are concerned, and against which such applicants have no just ground for complaint.

It will thus be seen that counsel is in error in claiming that applicants for permission to practice any of the limited branches provided for in Section 1274-1 are being discriminated against in favor of those who practice osteopathy, even if osteopathy be regarded as a limited branch, for the list of subjects prescribed for examination does not appear as formidable as the list assigned for the examination of osteopaths.

The argument, therefore, fails.

It was perhaps quite unnecessary to go into the history of this legislation in order to pass upon the constitutionality of the statutes in question, as that no longer seems an open question since the rendering of the following decisions: *Triplett v. State*; 23 C.C.(N.S.), 172; *State v. Hughes*, 83 Ohio St., 445, reported without opinion, and *State v. Marble*, 72 Ohio St., 21, 25. Nevertheless, we have seen fit to give the above reasons in answer to the argument made in this case, because they embrace a view of the situation not presented by the authorities.

As to the other ground of error, namely, that the court refused to give certain instructions in writing to the jury before argument, it is sufficient to say that the statute providing for special instructions before argument applies only to civil cases.

We find no error in this record prejudicial to the rights of the plaintiff in error, and the judgment will be affirmed.

Judgment affirmed.

WASHBURN and VICKERY, JJ., concur.

DEFENSE OF PAYMENT IN AN ACTION ON A NOTE.

Court of Appeals for Sandusky County.

(Shohl, P. J., Hamilton and Cushing, JJ., of the First District, sitting by designation.)

WORST V. COLONIAL SAVINGS BANK & TRUST CO.

Decided, June 20, 1919.

Judgment—May Not be Entered on a Special Verdict, When—Amount Recoverable on Promissory Note—Must be Determined by Jury, and Not the Court, When—Proof of Payment of Note—Not Authorized Under a General Denial.

1. In the absence of a general verdict, judgment should not be entered upon a special verdict unless the answers to the interrogatories submitted determine all the facts essential to the judgment, without reference to the testimony. (*Fries v. Mack*, 33 Ohio St., 52, distinguished.)
2. On the trial of an action on a promissory note, where a general verdict is not returned and the jury fails to answer a special interrogatory as to the amount to be recovered by the plaintiff, the trial court is not authorized to calculate the sum due plaintiff on the face of the note and enter judgment for the amount thus arrived at, since under the provisions of Section 11455, General Code, it is the duty of the jury to determine the amount to be recovered.
3. A general denial in an action on a promissory note does not authorize proof of payment.

Frank O'Farrell and W. J. Mead, for plaintiff in error.

D. B. Love, and H. C. DeRan, for defendant in error.

CUSHING, J.

Heard on error.

The Colonial Savings Bank & Trust Company brought an action against J. W. Worst in the Common Pleas Court of Sandusky County, to recover a judgment on a promissory note executed and delivered by Worst to the bank. The petition was in short form under the code. A copy of the note, with all credits and endorsements thereon, was set out in the petition.

Worst interposed three defenses: A general denial, and the affirmative defenses that there was no consideration for the note, and that its execution and delivery were procured by false and fraudulent representations made by the bank.

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On the trial of the cause, at the conclusion of all the testimony, a special verdict was requested and returned. The jury in the special verdict answered nine of the ten interrogatories submitted. The tenth interrogatory was: "If upon your verdict, the court should be of the opinion that the plaintiff is entitled to judgment, at what amount do you assess his damages?" This question was not answered.

January 24th, the jury deliberated and returned into court with the special verdict, which was received, filed, and the jury discharged. Defendant moved for judgment. At the time defendant excepted to the receipt of the verdict.

January 27th plaintiff moved for judgment.

January 31st motion for judgment for defendant, notwithstanding special verdict. Motion overruled. Defendant excepted.

Motion to set aside special verdict and for new trial overruled. Defendant excepted.

Judgment in favor of plaintiff on special verdict rendered in sum of \$4,583.71, with interest from January 6, 1919, and costs of suit. Defendant to have statutory time for bill of exceptions.

It was stated in argument that the court calculated interest on the face of the note and thus arrived at the amount of the judgment. Plaintiff in error contends that the action of the court in referring to the note offered in evidence to ascertain the amount due and the dates from which the interest should be calculated did not constitute the entering of a judgment on the verdict as provided by law. Section 11465, G. C., provides as follows: "When by the verdict either party is entitled to recover money from the adverse party, the jury must assess the amount of the recovery in its verdict."

In the case of *Niebling v. Laidlaw*, 12 C. C. (N. S.), 463, the court in construing Sec. 5203, Rev. Stat., predecessor of Sec. 11465, G. C., held that if there was a mistake in the amount assessed by the jury it should have been sent out again for further deliberation, and quotes with approval *Claiborne v. Tanner*, 18 Tex., 68:

"There can be no clearer principle than that: 'Where a jury has intervened, and all the issues have been submitted to their

decision, their verdict must constitute the basis of the judgment. The court can not look to the evidence on which the verdict is found, in order to determine what judgment to render, but must look alone to the verdict.' "

Defendant in error cites the case of *Imperial Fire Ins. Co. v. Kierman*, 83 Ky., 468, to support its contention that the court was correct in taking the face of the note and calculating the interest and thus arriving at the amount of the judgment. In that case, at page 480, the court say:

"The special verdict found that the parties had, by agreement through arbitrators, fixed the entire loss, and it found the amount so fixed. This was before the court."

Clementson on Special Verdicts, page 224, states the rule to be:

"However clear and undisputed the evidence upon the issues not found, the court can not render judgment without usurping in part the functions of the jury, thereby infringing the right guaranteed by the Constitution and laws."

The case of *Fries v. Mack*, 33 Ohio St., 52, is cited in support of the contention that this judgment should be upheld. In that case the jury found that the amount due was \$7,000, that there were seven promissory notes of \$1,000 each, dated February 2, 1860. "The verdict awards 'interest from the date of maturity of the seven notes.' "

At page 61 the court say:

"The court found, from facts outside of the record, that the jury intended by their verdict to refer to certain notes, which had been offered in evidence upon the trial. Perhaps they did so intend, though the verdict does not say so. The facts found in regard to it are neither expressed nor necessarily implied in its language. But, even if it had been expressly stated in the verdict that the notes therein referred to were the same which had been offered in evidence, would it have been competent for the court to look to the evidence, or to any matter *dehors* the record, for the purpose of fixing that which it was the sole province of the jury to determine? We think not."

In the *Fries* case the petition stated an action on the transcript of a judgment from the state of Kansas. The original action was based on the notes referred to and that were offered

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in evidence on the trial of the case in the superior court of Cincinnati.

In the case at bar the petition sets out a copy of the note. The rate of interest is fixed in the note at 6 per cent. The principal sum bears interest from date, and provision is made in the note for interest at 6 per cent. after maturity on other sums. The jury did not find the amount due as in the *Fries case*, nor that the sum so found should bear interest, nor when the second computation of interest at 6 per cent. should commence. Whether the court looked to the petition, or to the note offered in evidence, the questions involved were such that the amount should have been left to the jury for its determination under the statute.

In the absence of a general verdict, judgment should not be entered upon a special verdict of the jury unless the answers determine all the facts essential to the judgment without reference to the testimony. Such special verdict can not be aided by intendment or by extrinsic facts. 38 Cyc. 1919; *Farmers Savings Bank v. Burr Forbes & Son*, 151 Ia. 627 (132 N. W., 59), and *Spokane & I. E. Ry. v. Campbell*, 217 Fed., 518. See also *Bullock v. Mitchell*, 16 Bull. 354 (9 Dec. 687).

It is contended that the court was in error in submitting interrogatories 5, 6 and 7 of the special verdict to the consideration of the jury. In the absence of a bill of exceptions, we are unable to pass upon that assignment of error. From the answers, and answers to interrogatories 8 and 9, it would seem that the case was tried on the theory that the general denial put in issue the question of payment of the note or of partial payments.

The answer of the defendant below does not plead payment. Payment of a promissory note is an affirmative defense. *Margeson v. Kellar*, 12 C.C.(N.S.), 496.

A general denial in an action on a promissory note does not authorize proof of payment. The rule is that in actions which require allegations of demand and non-payment, such as an action on a lease or an account, plaintiff must plead and prove such issues. In an action where demand and non-payment are not essential allegations of plaintiff's cause of action, as in an action on a promissory note, payment is an affirmative defense and must be specially pleaded and proved. *Cochran v. Reich*, 36

N. Y. Supp., 233; *Guttermann v. Schroeder*, 40 Kans. 507 (20 Pac. 230); *Melone v. Ruffino*, 129 Cal. 514 (62 Pac. 93; 79 Am. St., 127), and *Wolffe v. Nall*, 62 Ala., 24.

Counsel urge that the motion of plaintiff and defendant for judgment on the special verdict brought the case within the rule of *Beckel v. Ohio National Life Insurance Company*, 15 N. P. (N.S.), 266, and *Perkins v. Putnam Company (Comrs.)* 88 Ohio St., 495. The rule of the cases stated is that where both the plaintiff and defendant at the conclusion of all the testimony move the court for an instructed verdict, such motions, in law, waive a trial by jury and submit both the questions of law and fact to the court. The motions in this case were made after the special verdict had been returned, filed and the jury discharged. There was presented the one question as to whether or not the court could ascertain from the special verdict returned by the jury the amount due and calculate the interest without reference to the evidence in the case.

The judgment will be reversed and the cause remanded for a new trial.

Judgment reversed and cause remanded.

SHOHL and HAMILTON, JJ., concur.

APPEAL FROM THE INDUSTRIAL COMMISSION.

Court of Appeals for Hamilton County.

INDUSTRIAL COMMISSION OF OHIO V. STRASSEL.*

Decided, June 23, 1919.

Industrial Commission—Rejection of Claim by—Appeal from—Statement by Injured Man to Physician Six Months After the Accident as to Cause of Injury—Inadmissible in Action on Account of the Injury.

1. In perfecting an appeal under Section 1456-90, General Code, the grounds for rejection of the claim by the Industrial Commission need not be set forth in the petition.

* Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 21, 1919.

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2. Where an injured party makes a statement to a physician concerning the cause of the injury eight months after the accident happened, such statement is a mere narration of past events, is not a part of the *res gesta*, and is not admissible as evidence in an action for such injury.

Louis H. Capelle, Prosecuting Attorney, and Henry G. Hauck, Asst. Pros. Atty., for plaintiff in error.

Eli G. Frankenstein and George A. Hamma, for defendant in error.

HAMILTON, J.

Heard on error.

The action below was an appeal from the finding of the Industrial Commission of Ohio denying the right of the claimant, as the widow of Henry Strassel, to participate in the state insurance fund. The trial of the cause resulted in a verdict and judgment for the plaintiff, and the Industrial Commission prosecutes error to this court.

The first specification of error goes to the question of whether or not the petition states a cause of action and to the jurisdiction of the court to try the cause. Plaintiff in error urges that the petition was insufficient to state a cause of action and to give jurisdiction to the trial court to try the cause, in that it fails to set up the grounds of the rejection of the claim, as found by the Industrial Commission.

Section 1465-90, G. C., gives a claimant who is denied the right to participate at all in the insurance fund the right of appeal, as follows: "On the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such board, may * * * appeal," etc.

It will be observed that the statute conferring the right of appeal does so upon condition that final action of board denies the right of the claimant to participate at all in the fund upon one of the grounds therein enumerated.

It is averred in the petition:

“That the Industrial Commission of Ohio declined to allow appellant’s claim and informed appellant in writing on July 28th, 1916, of the disallowance; that thereupon the said Industrial Commission was asked to rehear the claim; that said claim was reheard and the former finding of the Commission disallowing said claim was approved and confirmed in writing, under date of November 21st, 1916.

“That in accordance with the provisions of Section 1465-90 G. C., she has filed her appeal from the aforesaid final action of the defendants on the 12th day of December, 1916.”

While the language used in the statute is not adopted by the pleader, nor any of the grounds therein set forth specifically enumerated in the petition, she does aver that her appeal is prosecuted under the authority of the section above quoted. Great liberality is permitted in proceedings under the Workmen’s Compensation Law in order to carry out the spirit and intendment of that beneficent statute. We are therefore of opinion that facts sufficient to state a cause of action and to give jurisdiction to the court of common pleas are stated.

The second claim of error is that the court below erred in refusing to exclude the testimony of Dr. Wenning of statements by the decedent as to the cause of injury. It appears from the record that Dr. Wenning was permitted to testify to conversations between the decedent and himself in which the decedent narrated the circumstances relative to the cause of the alleged injury. It is claimed that the injury occurred in May or June, 1915, while the conversations and statements of the deceased as to the cause of the alleged injury took place in February, 1916, some eight months after the date of the alleged injury. The admission of this testimony was prejudicial error.

While the statements of a patient to a physician of his pain and suffering, and in regard to his present bodily and mental condition, to enable the physician to form an opinion of the extent and nature of his injuries, are competent, it is not competent for the physician to testify to the patient’s statements as to specific causes of injury, that being one of the issues before the jury.

In the case of *Lake Shore & M. S. Ry. v. Yokes*, 12 C. C. (N.S.), —, the first paragraph of the syllabus is as follows:

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“In an action to recover for injuries to the person, claimed to have been received in a railway collision, a physician who had been employed by the plaintiff to examine and treat her, can not be permitted to testify, as a witness in her behalf, to statements of the plaintiff as to the cause of such injuries, or that she attributed her condition to injuries received in such collision.”

In the above case of *Lake Shore & M. S. Ry. v. Yokes*, the authorities on these propositions are collated and elaborately quoted from by the court in the opinion, and it is unnecessary here to reiterate the authorities there cited, except to briefly mention them. The testimony of Dr. Wenning complained of is shown in the following answer:

“He said that he had previously—I forgot the exact time before—he had been lifting a heavy body, I think it was a truck body to place on a chassis or something, and that somebody had let go who had been lifting it with him, let go his end of it, and that he had to bear the whole brunt of it, and that he felt a great strain.”

This was a statement of a material fact and was used as evidence of that fact.

In the case of *Bacon v. Inhabitants of Charlton*, 61 Mass. (7 Cush.), 581, Justice Bigelow says at page 586:

“Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. * * * There are ills and pains of the body, proper proofs in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, *a present* existing pain or malady.”

In the case of *Inhabitants of Ashland v. Inhabitants of Marlborough*, 99 Mass., 47, the court say:

“A physician’s testimony can not include a recital of past events which his patient made to him.”

In *Roosa v. Boston Loan Co.*, 132 Mass., 439, it was held:

“The statement by a patient to his physician of the cause of an injury from which he is suffering, is inadmissible as evidence of that cause in an action for the injury.”

The authorities hold uniformly that a physician called to treat the plaintiff may not testify as to what the plaintiff said was the cause of the injury and that plaintiff attributed his present condition to such injury. The facts in this case with reference to the physician's testimony are clearly within the rule, and the testimony as to the statements of Strassel as to how the injury occurred, which alleged injury had happened some eight months prior thereto, should have been excluded from the jury.

Counsel for defendant in error urge that the testimony of Dr. Wenning was admissible as a part of the *res gestae*, that although eight months had elapsed from the date of the alleged injury to the time of the statements to the physician a mere lapse of time would not prevent the statements of decedent from being a part of the *res gestae*. While it has been held that mere lapse of time alone is not a decisive test as to whether or not statements are a part of the *res gestae*, the evidence in this case was a mere narration of past events and clearly hearsay evidence on the part of the physician, and in no way included such spontaneous exclamations, and was not so interwoven with the principal fact as to be regarded as part of the *res gestae*.

The motion for a new trial should have been granted.

The judgment will be reversed and the cause remanded for a new trial.

Judgment reversed and cause remanded.

SHOHL and CUSHING, JJ., concur.

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VIEWS OF VENIREMEN AS TO RECOMMENDATIONS FOR MERCY

Court of Appeals for Stark County.

CHARLES BURNETT V. STATE OF OHIO.

Decided, September Term, 1917.

Jury—Examination of Veniremen on Voir Dire in First Degree Murder Cases—May be Questioned as to Their Views on Recommendation of Mercy.

Inquiry by counsel for the state during examination of veniremen on their *voir dire* as to views which they may entertain as to recommending mercy if the evidence and the law require a verdict of murder in the first degree is proper for the purpose of ascertaining any bent of mind on the part of a venireman which might make him a fit subject for peremptory challenge.

Braucher & Sterling, for plaintiff in error.

Frank N. Sweitzer, Prosecuting Attorney, and *Thos. H. Leahy*, Assistant Prosecutor, contra.

SHIELDS, J.

At the May (1917) term of the court of common pleas of said Stark county, the grand jury of said county returned an indictment against the plaintiff in error for murder in the first degree. Upon a plea of not guilty being entered, the plaintiff in error was tried upon said indictment and found guilty by a jury. Upon a motion for a new trial being overruled, the plaintiff in error was sentenced by said court to be electrocuted according to law. Error is alleged to have intervened in the selection of the jury for the trial of said cause, and for other alleged errors, for which a petition in error was filed to reverse said judgment of conviction and sentence.

While said petition in error contains numerous assignments of error, the principal ground of alleged error relied upon and argued was that contained in the fourth ground stated in said petition in error and which is as follows:

1. The first part of the report is a general introduction to the project. It describes the purpose of the study and the objectives that were set at the beginning. It also provides a brief overview of the methodology that was used.

2. The second part of the report is a detailed description of the methodology that was used. It includes a description of the data collection methods, the sample size, and the statistical tests that were used.

3. The third part of the report is a description of the results that were obtained. It includes a description of the data that was collected and the results of the statistical tests.

4. The fourth part of the report is a discussion of the results. It discusses the implications of the findings and compares them to the results of previous studies.

5. The fifth part of the report is a conclusion. It summarizes the findings of the study and provides recommendations for future research.

6. The sixth part of the report is a list of references. It includes a list of all the sources that were used in the study.

7. The seventh part of the report is an appendix. It includes a list of all the data that was collected.

8. The eighth part of the report is a list of figures. It includes a list of all the figures that were used in the study.

9. The ninth part of the report is a list of tables. It includes a list of all the tables that were used in the study.

10. The tenth part of the report is a list of abbreviations. It includes a list of all the abbreviations that were used in the study.

11. The eleventh part of the report is a list of keywords. It includes a list of all the keywords that were used in the study.

“4. Said court erred in permitting the defendant in error to inquire of the jurors at the time the jury was impanelled of their views and opinions on the question of recommending mercy, and to which the plaintiff in error at the time excepted.”

In the exercise of a power conferred upon it by the Constitution guaranteeing and preserving to every person charged with crime the right of trial by jury, the Legislature of this state with a jealous regard for such right in capital cases has provided a scheme of legislation outlining various modes of procedure to be observed at each successive step taken in such cases from the time of the indictment of the accused to the close of the trial—all such legislation being enacted to secure to the accused a fair and impartial trial. In short, the law aims to afford to one thus charged its full measure of protection. Along the line of such procedure, it is provided that care and circumspection shall be observed in the selection of veniremen and to this end it is provided in the General Code as follows:

“Section 13653. The following shall be good cause for challenging a person called as a juror on an indictment:

“First. That he was a member of the grand jury which found such indictment;

“Second. That he has formed or expressed an opinion as to the guilt or innocence of the accused; but if a juror has formed or expressed such opinion, the court shall thereupon examine such juror on oath as to the grounds thereof, and if such juror says that he believes he can render an impartial verdict notwithstanding such opinion, and the court is satisfied that such juror will render an impartial verdict on the evidence, the court may admit him as competent to serve as a juror in such case;

“Third. In indictments for a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death.”

The remaining portions of said section are omitted for the reason that they have no application to the case before us.

It is further provided in Sec. 13654 G. C.:

“Challenges for cause shall be tried by the court on the oath of the person challenged, or other evidence, and shall be made before the jury is sworn.”

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It will thus be seen that the selection of the jury is largely confided to the judgment of counsel for the accused and the state, under the direction of the trial court, who by express provision of the statute shall determine the qualification and eligibility of veniremen in a capital case.

The question made on the record before us is not that any such veniremen were challenged on the ground of a previously expressed opinion or preconceived notions of capital punishment, or on the suspicion of any prejudice against or partiality for either the accused or the state, or for any other known cause rendering such veniremen incapable or unfit to serve, except it is contended that said court erred in permitting counsel for the defendant in error to inquire of at least some of the veniremen on their *voir dire* as to the views entertained by them on the question of recommending mercy where the evidence and law required a verdict of guilty of murder in the first degree. The section of the code on which said indictment was predicated is as follows:

“Sec. 12400. Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life.”

The constitutionality of this statute having been passed on, we are not here called upon to discuss that feature of it, whatever our views may be concerning the provision therein giving to the jury the right to recommend mercy in a first degree murder case, under a verdict of guilty, and especially since the jury in the case under consideration did not make any such recommendation. Referring to the record, it appears on page 6 thereof that one Albert Hurraw when called as a venireman into the jury box and after being interrogated by the state on the usual preliminary questions, including the question as to whether or not he was opposed to capital punishment, in a proper case, was cross-examined by counsel for the accused who asked him among others the following questions:

"Q. Have you any convictions or settled opinions on the question as to whether or not a jury if the evidence would warrant returning a first degree verdict, should or should not recommend mercy?

A. Well, that all depends on the jury.

Q. Well, I say have you any settled convictions to oppose or argue in favor of either one of those propositions?

A. No, I think not.

Q. You would then, as I understand you, take into consideration the evidence in the case upon that point?

A. Yes, sir.

Q. And you haven't any feeling or prejudice upon that point, one way or the other?

A. No, sir; the evidence is all I go by in the case.

Q. I think that is all."

"There being no challenge for cause the juror is directed to take his seat in the jury box and does take his seat in the jury box."

It will be noticed that no inquiry whatever, either before or after the cross-examination of the venireman, was made on behalf of the state.

It appears that the next venireman called into the jury box was F. M. Frederick, who was asked practically the same question by counsel for the accused, on cross-examination, as asked by him of the preceding venireman and who answered that he had no opinion on the question of recommending mercy, and who in re-direct examination in substance reiterated such opinion. The question pertaining to a recommendation of mercy having been brought out and having been gone into on cross-examination by the accused, we know of no reason under the rules of evidence why the state should not be allowed to cross-examine on the new matter thus brought out by the accused. Clearly we think the state had such right. The record further shows that this venireman, F. M. Frederick, was afterward challenged peremptorily by the accused. The answers of these veniremen, we think, furnish a full and complete answer to the contention made here on behalf of the plaintiff in error. As if appreciating the purpose of the inquiry made on behalf of the accused, it appears that they frankly and fairly, and no doubt truthfully, answered that in reaching a final conclu-

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sion in the case they would be guided solely by the evidence and the law, each reserving to himself in the end the right to take counsel of his conscience and then under his obligation as a sworn juror decide whether under all the evidence in the case there should or should not be a recommendation of mercy. Just how one in favor of the death penalty, in a proper case, could safely say at the outset of a trial what his mental attitude would be on the subject of favoring a recommendation of mercy at the end of such trial, under a finding of guilty, we will not stop to discuss, except to say there may be cases wherein at the conclusion of the deliberations of a jury it might be thought that the extenuating circumstances appearing justify a recommendation of mercy. Here we think it clearly appears of record that the examination of the veniremen mentioned on their *voir dire* shows an entire absence of partiality in favor of or against a recommendation of mercy. But supposing such examination had disclosed a partiality in favor of such recommendation, would it not then have been claimed that it furnished a sufficient ground for challenge for cause? It may be that it would, but whatever its effect, it appears that the answers to such inquiries were not made the subject of challenge for cause here by the accused and therefore it could not avail him after trial. *Mangano v. State*, 17 C. C. (N. S.), 595.

And it further appears here that while one of the veniremen thus inquired of as to his views of recommending mercy was peremptorily excused, as already stated, the other (Hurraw) was not so excused by the accused, although his right to further peremptory challenges under the statute was not exhausted before the jury was sworn.

As stated, the section of the statute cited provides that the trial judge shall be the trier of challenges for cause. All questions arising out of such challenges are to be passed upon and decided by such judge. He is clothed with the discretionary power to decide, and deciding, such decision is final, unless such exercise of discretion is manifestly abused. In *Serviss v. Stockstill*, 30 Ohio St., 418, it is held that:

“Where a party to an action challenges a juror on suspicion of partiality for the opposite party, the validity of such

challenge must be determined by the sound discretion of the court. And where such challenge is sustained, the judgment rendered in the case will not, for that reason, be reversed, unless an abuse of such discretion is clearly shown."

True, the foregoing was a civil action, but in Sub. 9 of said Section 13653 it is provided that "Like challenges shall be allowed in criminal prosecutions as are allowed in civil cases."

Of the purpose of said Section 13653 it is not necessary to discuss. As already stated, it aims to give one charged with crime a fair and impartial jury. As applied to this case, one of the challenges for cause to a venireman (Sub. 2) is "that his opinions preclude him from finding the accused guilty of an offense punishable with death." The statute (Sec. 12400) upon which the indictment is predicated reads "Whoever * * * kills another is guilty of murder in the first degree, and shall be punished by death unless the jury trying the accused recommend mercy * * *." Here it appears that the infliction of the death penalty and the recommendation of mercy are so closely related in said section that inquiry as to one would readily authorize inquiry as to the other. Of course, if the result of such inquiry should afford a ground of challenge for cause, as already indicated, that would end the matter. The section referred to reads—"The court shall thereupon examine such juror as to the grounds thereof." Under this section regulating the selection of jurors in a capital case, neither the accused nor the state is restricted to any prescribed forms of questions to be asked as furnishing challenges for cause, as in other jurisdictions; hence a wide range of inquiry is permissible for the purpose of ascertaining the extent to which the mind of a venireman is affected for or against either party. Keeping in mind, then, that the object of said section is to permit an examination of the venireman that will elicit his mental attitude bearing upon his qualifications to serve as a juror, what reasonable objection could be urged against inquiry being made as to the views of such venireman in respect to one of the provisions of said section upon which the crime charged is based, in view of the statutory duty imposed upon the trial judge as

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indicated? Not unlike the accused, the state is entitled to know in advance of the trial whether the jury being selected is to be composed of men who are fair and impartial and who having no conscientious scruples against the infliction of the death penalty will return a verdict in accordance with the evidence and the law, or whether it shall enter upon the trial with a prejudged verdict. Our judgment is that the rights of both the state and the accused in this respect are equal. While it is evident that the answers made to the questions put to said veniremen did not affect the legal rights of the accused one way or the other, and hence no prejudice resulted to the accused, there still remains an additional reason, in our judgment, why the questions asked on re-direct examination of the venireman, were proper, and that is, in testing his qualifications, it was proper to thus inquire to ascertain whether or not such inquiry developed any bent of mind on the part of the venireman which might be deemed of sufficient importance to be taken advantage of in the subsequent peremptory challenges liable to be exercised. A discussion of this subject may be found in 1 Thompson, Trials, 2 ed. Secs. 101, 102 and 103 and wherein it is laid down that—

“Within reasonable limits, each party has a right to put pertinent questions to show not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will exercise his right of peremptory challenge.”

For the foregoing reasons we hold that this ground of alleged error is not well taken.

Among other errors assigned is that the court below erred in admitting in evidence the alleged confession of the plaintiff in error. An examination of the bill of exceptions shows that every reasonable precaution was taken by the trial court, preliminarily, to ascertain its competency before admitting the same. That it was made voluntarily, without threats or promises and not induced by hope or fear excited in the mind of the accused, is furnished in the record that the same confession is to be found in the testimony of the accused himself when

upon the witness stand as a witness in his own behalf. *Spears v. State*, 2 Ohio St., 584; *Rufer v. State*, 25 Ohio St., 464, 470; *State v. Knapp*, 70 Ohio St., 380.

We have examined the remaining assignments of error in said petition in error and find no substantial or prejudicial error to the plaintiff in error in the entire record. There is but one alternative left this court, therefore, and that is to affirm the judgment of the court below, however much we would prefer, if we could see our duty to do otherwise. We are moved to say this not because we believe that life would be rendered secure by a lax administration of the criminal law by condoning in any degree a crime like this, if committed under the influence of a long continued drunken debauch, but because the evidence upon the trial, furnished largely by the accused himself, tends to show either a selfassumed display of mawkish bravado, or a mind lacking in criminal responsibility. Of the former we are not concerned; of the latter, it is only necessary to say that it is apparent from an examination of the charge of the trial court that the jury were instructed at no little length on the resultant effect of the excessive use of intoxicants by the accused as affecting his legal responsibility as a free agent, but under this charge in its application to the evidence introduced upon the trial it appears the obligation of duty resting upon the jury required the rendition of an undivided and unqualified verdict of guilty. As a reviewing court, we can not do otherwise than approve the verdict.

The judgment of the court of common pleas will be affirmed, and said cause is remanded for execution.

POWELL and HOUCK, JJ., concur.

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Cuyahoga County.

**INSURED PROPERTY DAMAGED WHILE DEED IS HELD
IN ESCROW.**

Court of Appeals for Cuyahoga County.

PECK V. HALE ET AL.

Decided, February 7, 1919.

Fire Insurance—Forfeiture Clause not Rendered Inoperative— By Sale of Property and Placing of Deed in Escrow—Insurance Money for Benefit of the Property—And for Benefit of Vendee upon Compliance with Terms of Escrow Agreement—Order for Payment of Insurance to Vendee Without Declaring A Trust not Erroneous.

1. A sale of real estate had been made and the deed placed in escrow. While the deed was in the hands of the escrow agent the property was damaged by fire and the insurance money paid to the vendor, who, on demand,, refused to pay it to the vendee. *Held*: The insurance policy did not become void under the general forfeiture clause of the policy which provided that it should be void if a change took place in the interest, title or possession of the subject of the insurance.
2. Payment by the insurance company was for the benefit of the property, and the money paid to the vendor is for the benefit of the vendee, providing the vendee complies with the terms of the escrow agreement.
3. Upon compliance by the vendee with the terms of the agreement and payment of the purchase price to the escrow agent, who delivers the deed to the vendee and the money to the vendor in the absence of any modification of the original agreement there is thereby implied a promise on the part of the vendor to pay over the money received from the insurance company to the vendee, and the same may be recovered by proper proceedings.
- 4 Even though the situation thus presented has ordinarily been regarded as one requiring the intervention of a court of equity to declare that the insurance money was held in trust for the vendee, yet when the allegations of the pleadings clearly reveal the foregoing situation to a court of legal and equitable jurisdiction, and no objection is made to the form of the suit or to the prayer of the petition, it is not error for the court upon motion made, to render judgment upon the pleadings in favor of the vendee for the amount of said insurance money.

C. W. Toland, for plaintiff in error.

J. Paul Thompson and Frank C. Scott, contra.

DUNLAP, J.

Heard on error.

We shall state the conclusions at which we have arrived, and the reasons for the same, in our opinion in this case.

The pleadings show that a contract of sale of real estate had been made, and a deed executed in compliance therewith placed in escrow to be delivered to the vendee upon compliance upon his part with the contract, namely, the payment to the escrow agent of the balance of the purchase price, the deed to be delivered to the vendee at the time said purchase price was delivered to the vendor, but during the time the deed was in escrow, and awaiting delivery, the property was damaged by fire and the fire insurance money was paid to the vendor, who refused to pay it to the vendee upon demand. We hold:

First. The insurance policy did not become void under the general forfeiture clause of the policy which provided that it should be void if a change took place in the interest, title or possession of the subject of the insurance, that being the usual form of forfeiture in the standard insurance policy in vogue in this state.

Second. If a loss from fire occurs during the period of time in which the deed is in escrow, and such loss is paid to the vendor, the same is for the benefit of the property and will be money paid to the vendor for the benefit of the vendee, providing the vendee complies with the terms of the escrow agreement.

Third. When, in the absence of any modification of the original agreement, the vendee has complied with the terms of said agreement and paid the purchase price to the escrow agent, who delivers the deed to the vendee and the money to the vendor, there is thereby implied a promise on the part of the vendor to pay over the money received from the insurance company to the vendee, and the same may be recovered by proper proceedings.

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Fourth. Even though the situation thus presented has ordinarily been regarded as one requiring the intervention of a court of equity to declare that the insurance money was held in trust for the vendee, yet when the allegations of the pleadings clearly reveal to a court of legal and equitable jurisdiction the foregoing situation, and no objection is made to the form of the suit or the prayer of the petition, it is not error for the court, upon motion made, to render judgment upon the pleadings in favor of the vendee for the amount of said insurance money.

We find no error prejudicial to the plaintiff in error in the record in this case, and the judgment will be affirmed.

Judgment affirmed.

GRANT and WASHBURN, JJ., concur.

**DIVORCED WIFE WITHOUT DOWER RIGHTS IN AFTER
ACQUIRED REALTY.**

Court of Appeals for Clermont County.

SPAULDING V. SPAULDING ET AL.

Decided, June 30, 1919.

Dower—Real Estate Acquired by Husband after Divorce—Not Subject to Dower Rights of Former Wife—Decrees of Divorce Granted in Other States—Entitled to Full Faith and Credit.

1. A wife is not entitled to dower in lands acquired by her husband subsequent to the termination of the marriage relation by the granting of a divorce to the husband.
2. Under the laws of this state full faith and credit are given to a divorce decree of another state, and a transcript of it is admissible in evidence as proof of its rendition.

H. S. Stevenson, for plaintiff in error.

H. E. Engelhardt, for defendants in error.

HAMILTON, J.

Heard on error.

Plaintiff claims dower as the widow of Chauncey P. Spaulding in certain real estate described in the petition.

The record discloses the following facts: In 1867, plaintiff intermarried with Chauncey P. Spaulding, and they lived together as husband and wife until about October 1, 1900, when they separated, the husband going to Indiana. The cause of the separation is not shown. The husband, prior to the separation, had gone to Indiana on business trips at different times, but had returned after short absences. He did not return to his wife after the separation in October, 1900. November 16, 1901, the husband was granted a divorce from plaintiff by the court of Madison county, Indiana. Service was made by publication. There was no personal service on the wife. The wife claims to have had no notice of the pendency of the suit for divorce. She admits she received a paper from Indiana October 16 or 17, 1901, stating a divorce had been granted Chauncey P. Spaulding. Since the divorce was not granted until November 16, 1901, the notice she received must have been the notice of the pendency of the suit, although this is not material to the determination of the question involved. At the time of the granting of the divorce, the husband was not seized of the real estate in question, but procured the title thereto several years after. The said Chauncey P. Spaulding died March 21, 1918, and plaintiff claims to be endowed of the lands in question as his widow.

Under the law applicable to the case, it is clear that the Indiana decree could not affect the rights of the wife as to her dower rights in lands acquired during coverture, or held by Chauncey P. Spaulding at the time of the granting of the decree for divorce. *Mansfield v. McIntyre*, 10 Ohio, 28, and *Doerr v. Forsythe*, 50 Ohio St., 726 (35 N. E., 1055; 40 Am. St., 703). The divorce severed the marriage relation of the parties and is valid, excepting as to questions of alimony and dower in lands acquired during coverture or held at the time the decree for di-

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vorce was entered. *Mansfield v. McIntyre*, *supra*, and *Cox v. Cox*, 19 Ohio St., 502.

The question for determination therefore is: Is plaintiff entitled to dower in real estate *acquired after the entry of the divorce decree?*

In the case of *Nichols v. Park*, 79 N. Y. Supp., 547, 549, the court say: "With respect to land or an interest in land acquired by the husband subsequent to the divorce granted * * * terminating the marriage relation, no dower right could attach." Citing *In re Ensign's Estate*, 103 N. Y., 284, and *Kade v. Lauber*, 16 Abb. Prac. N. S., 288.

In the case of *Kirkpatrick v. Kirkpatrick*, 197 Ill., 144, 152 (64 N. E., 267), the wife procured a divorce for the aggressions of the husband, and no order was made affecting the dower of the wife. In that case the court held that the wife was entitled after the death of the divorced husband to dower in any land of which he was seized at the time of the entry of the decree of divorce.

A wife can have no dower in lands acquired by her husband subsequent to the termination of the marriage relation by divorce. 14 Cyc., 935.

Under the provisions of Sec. 11991, G. C., it is provided that where a divorce is procured by the wife for the aggressions of the husband, she shall be entitled to her right of dower in his real estate, not allowed her as alimony, of which he was seized during coverture. It is therefore the law that plaintiff can have no dower in the real estate in question, the same having been acquired subsequent to the Indiana divorce severing the marriage relation.

Objection was made to the introduction in the trial of this case of the transcript of the decree of divorce granted by the Indiana court, counsel for plaintiff urging that the transcript of the decree of divorce was not admissible under the full faith and credit provisions of the constitution, citing as authority the case of *Haddock v. Haddock*, 201 U. S., 562 (50 L. Ed., 867; 26 Sup. Ct., 525). The case of *Haddock v. Haddock* is authority for the proposition that the state of Ohio is not bound to give

full faith and credit to the decision of the court of Indiana under the circumstances in question. Under the law of Ohio, this state does give faith and credit to such decisions to the extent of recognizing the validity of the divorce, even though it may not be forced to do so under the constitution.

The judgment will be affirmed.

Judgment affirmed.

SHOHL and CUSHING, JJ., concur.

TITLE TO NOTE PURCHASED AFTER RECEIVERSHIP OF PAYEE.

Court of Appeals for Cuyahoga County.

Kinkade, Richards and Chittenden, JJ., of the Sixth District, sitting by designation.

THE MILLER BROTHERS STAR SHOE CO. V. GRIFFITHS.

Decided, May 12, 1919.

Bills, Notes and Checks—Purchase of Note After Receivership of Payee—Purchase in Good Faith and Without Notice of Infirmary—Title in the Purchaser Where the Receiver Never Had Possession.

One who purchases of the payee in good faith by indorsement and delivery for value, before maturity, a negotiable promissory note without notice of any infirmity in the instrument or defect in the title, is a holder in due course, even though a receiver of the property of the payee had been appointed and qualified, the purchaser having no knowledge of that fact, and the receiver never having been in actual possession of the instrument.

Turney, Olds & Sipe and I. N. Loeser, for plaintiff in error.
Gaughan & Collins, contra.

RICHARDS, J.

Heard on error.

Griffiths commenced an action in the municipal court of Cleveland to recover on a promissory note for \$500, executed March 12, 1918, by The Miller Brothers Star Shoe Company, payable

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in sixty days from its date to The Barry Brothers Company, or order. The trial resulted in a judgment in favor of the plaintiff, Griffiths, for the amount of the note and interest, and it is urged in this court that the judgment so rendered is against the evidence and contrary to law and should therefore be reversed.

The controlling facts in the case are not in controversy. The next day after the promissory note was executed and delivered to The Barry Brothers Company, the court of common pleas of this county appointed a receiver of that company, and the journal entry appointing the receiver directed him, upon being qualified, to take and keep possession of all the property of the company and hold the same subject to the further order of the court, and also directed that all persons having property in their possession or under their control, belonging to the company, should deliver the same to the receiver. The receiver qualified on the date of his appointment and promptly demanded of The Barry Brothers Company, and the officials thereof, all property under their control belonging to said company.

On or about the 17th of March, 1918, David J. Barry, who was president and manager of The Barry Brothers Company, and who had full knowledge that a receiver had been appointed for the company, endorsed and delivered the promissory note on which the action was based to William Griffiths, for full value, and the endorsee took the same without any knowledge that a receiver of said company had been appointed, and without knowledge of any defenses to said note. The record discloses that Griffiths was well acquainted with The Barry Brothers Company and had frequently transacted business of this character with them before that time. Under these circumstances this court is of the opinion that William Griffiths became a *bona fide* holder of the instrument in due course and is entitled to recover the amount thereof of the maker.

The matters in controversy in this case are covered in large part by various sections of the Negotiable Instruments Act, as found in Secs. 8135, 8156, 8157 and 8162, G. C., These sections provide in substance that the negotiation of an instrument of this character is effected by endorsement of the holder com-

pleted by delivery, that payment to the holder in due course discharges the instrument, and the statute so defines a holder in due course as to include one who becomes the owner of an instrument under the circumstances shown by the evidence in this case, and authorizes such holder to enforce payment of the instrument against the parties liable thereon. While the receiver who was appointed in this case was authorized to take possession of all the property of the company, he did not, by the order of appointment, become invested with the legal title to this promissory note, but the title to the instrument still remained in the original payee and the transfer of the note by endorsement of that payee for value, and, under the circumstances shown, passed to and authorized a recovery on the part of the endorsee.

As a general rule of law the maker of a note can not question the authority or capacity of the payee to make a transfer thereof. The principle is announced in substantially this language in 3 Ruling Case Law, 994, and in 8 Corpus Juris., 336, and is sustained by numerous authorities, the leading case being *Drayton v. Dale*, 2 Barn. & Cr., 293. The cases are collected in Bigelow on Estoppel, 495.

Merrick v. Merchants' Nat. Bank, 11 Dec., 293 (8 N. P., 411), affirmed by the circuit court and by the supreme court in *Merchants' Nat. Bank v. Merrick*, 67 Ohio St., 530 (67 N. E., 1094), without opinion, is not in conflict with the principles herein announced. That was an action brought by the receiver against the endorsee, and the court found that the bank, which had become the purchaser of the instrument, never had any previous dealings with the firm and had not taken ordinary precautions. There are further distinctions between that case and the one at bar, which we need not indicate.

We are not attempting in this case to decide what if any rights the receiver of The Barry Brothers Company may have with respect to this note.

For the reasons given the judgment will be affirmed.

KINKADE and CHITTENDEN, JJ., concur.

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Mahoning County.

DIVORCE OBTAINED BY WIFE FROM NON-RESIDENT HUSBAND.

Court of Appeals for Mahoning County.

CHACHE V. CHACHE.

Decided, May 28, 1919.

Husband and Wife—Right of Wife to Acquire a Residence in Another State—Benefit of Divorce Laws Acquired by Her—Non-Resident Husband Bound by the Decree—Status of Such a Decree in other States.

1. When a wife is justified in separating from her husband by reason of his aggression, she may lawfully select and acquire a residence separate from his.
2. If the wife removes into this state and acquires a *bona fide residence* herein for the length of time required by our Code, she is entitled to the benefit of our divorce laws, although during all of the time she lived with her husband he was a resident of another state and continued to reside therein.
3. Such a decree of divorce is binding within this state on both husband and wife, although the husband did not enter his appearance in the case and no service was had upon him other than by publication, as required by the Code in divorce proceedings.
4. Such a decree of divorce is not entitled to obligatory enforcement in other states under the full faith and credit clause of the federal constitution, but it may be given such degree of efficacy therein under the principle of comity as their own conception of duty and public policy may require.

POLLOCK, J.

This is an action prosecuted to reverse the judgment of the court of common pleas of this county in a case in which the plaintiff failed to recover a judgment of divorce from the defendant on the ground of extreme cruelty.

The plaintiff, in her petition, alleged that she had been a resident of the state of Ohio for more than one year last past; that she was a *bona fide* resident of Mahoning county, and wrongful

acts of the defendant toward her sufficient to authorize a divorce on the grounds of extreme cruelty.

Service was had on the defendant under the statute of this state authorizing a summons upon a non-resident by publication. No personal service was had on the defendant, and he did not appear in the action.

The court of common pleas found that the plaintiff had left her husband in the state of Missouri, coming into the state of Ohio, and into Mahoning county more than a year prior to the filing of the petition, with the intention of making Mahoning county her permanent residence.

The court also found that the extreme cruelty of the husband towards the wife was sufficient to require that a divorce be granted her under the statute of this state, but found that the marriage was consummated in the state of Missouri, where the plaintiff and defendant resided from the time of the marriage until the separation, which was caused by the aggressions of the husband. After the separation the plaintiff came to this city; the husband remained in the state of Missouri.

The court refused to grant the divorce on the ground that it did not have jurisdiction by reason of the marital residence of the wife being in the state of Missouri. These facts appear in the judgment of the court.

The only question then submitted to this court for determination is whether a woman who was married in another state, and resided in that state with her husband until her separation from him on account of his wrongful acts committed in that state, can, after residing in this state the time required by our code, maintain an action for divorce in this state when the only service had upon the husband is by publication.

Section 11980 of the General Code reads as follows:

“Except in an action of alimony alone, the plaintiff must have been a resident of the state at least one year before filing the petition. Actions for divorce, or for alimony, shall be brought in the county where the plaintiff has a *bona fide* residence at the time of filing the petition, or in the county where the cause of action arose. The court shall hear and deter-

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mine the case, whether the marriage took place, or the cause of divorce occurred, within or without the state.'"

Under the finding of the court, the plaintiff in this action complied with all the conditions which are required to entitle her to a divorce under the statutes of this state. The court below held that a woman who was married and lived in another state during all the time that she had cohabited with her husband, could not obtain a divorce in this state, her husband retaining his residence in that state and not being personally served or appearing in the case.

We are informed that the court based its decision on the principle announced by the Supreme Court of the United States, which will be referred to hereafter.

The first question arises whether a married woman, who has resided during all of her married life up to the time of the separation with her husband in another state which is the residence of her husband, can acquire a residence in this state, the husband retaining his residence in the former state.

Under the finding of the court of common pleas of this county, plaintiff had a right to separate from defendant by reason of his extreme cruelty towards her.

When a married woman is justified in separating from her husband, his marital control over her which made his residence her residence is broken, and she can lawfully acquire an actual residence separate from his. She then has a right to select any place for her residence that she may desire. If she came into this state and lived here the required time with the intention of making her home herein, she became a resident of this state, and can prosecute an action for divorce, notwithstanding her husband remains in the state of their marital residence *Harding v. Alden*, 9th Greenleaf, 140 (23 Am. Dec., 549); *Gordon v. Yost*, 140 Fed., 79; *Skute v. Sargeant*, 67 New Hamp., 305 (36 Atl., 282; *Williamson v. Osenton*, 234 U. S., 619 (58 L. Ed., 578).

The Supreme Court of the United States, in *Sheever v. Wilson*, 9th Wall., 123 (19 L. Ed., 608), said:

“The rule is that she may acquire a proper domicile whenever it is necessary or proper that she should do so. The right springs from necessity for its exercise and endures as long as the necessity continues.”

When plaintiff was compelled to separate from the defendant because of his wrongful acts towards her, she could establish a residence of her selection, and if she came into this state with that intention, she would establish a residence here.

We are informed that the court below refused to grant plaintiff a divorce on the authority of the case of *Haddock v. Haddock*, 201 U. S., page 562 (50 L. Ed., 867).

In that case the plaintiff and defendant were married in the state of New York, where the wife had previously resided and where she continued to reside; that immediately after the marriage the parties had separated; that the husband had, after the separation, gone into the state of Connecticut and there without personal service or her appearance, obtained a divorce from his wife upon service by publication alone.

The Supreme Court in this case held that the divorce granted the husband in the state of Connecticut was not entitled to the protection of the full faith and credit clause of the Federal Constitution, but that the wife had a right to prosecute her action for divorce against the defendant in the state of New York, notwithstanding the prior divorce granted the husband in the state of Connecticut. The court did not hold that the divorce granted the husband in the state of Connecticut was not binding upon both parties in that state. On the other hand, it recognized the principle that the courts of Connecticut had a right, under the laws of that state, to grant to the husband a divorce which would be binding on both parties within that state.

The court say in the syllabus:

“Without questioning the power of the state of Connecticut to enforce the decree within its own borders, and without intimating any doubt that the state of New York might give it such degree of efficacy that it might be entitled to in view of the public policy of the state, that the Connecticut decree, rendered as it was without being based on personal service of the

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process on, and therefore without personal jurisdiction of the court over, the wife, was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause of the Federal Constitution."

And again—

"As a corollary to the power of the state, irrespective of any extraterritorial effect, any other sovereign may, under the principles of comity give to such a decree the efficacy which its own conception of duty and public policy may justify."

The court in the case above referred to do not limit the right of a state by authorized judicial proceedings to determine the status of a citizen towards a non-resident which will bind within the state all the parties to the action, even if the non-resident defendant does not enter his appearance and no service has been had upon him except by publication. This principle was fully recognized in the case of *Pennyroy v. Neff*, 91 U. S., 714 (24 L. Ed., 565), where in the opinion, Fields, Justice, on page 434, says:

"To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses, to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory."

This principle has been frequently recognized in divorce proceedings where the plaintiff has become a *bona fide* resident of the state, although the marriage contract was entered into, and the residence of the husband and wife, during all the time that they lived together, was in another state, and the residence of the defendant has not changed. *Tracy v. Tracy*, 62 N. J. Equity, 807 (48 Atl., 533); *Tolin v. Tolin* (2d Blackford, 407), 21

Am. Dec., 742; *Hubbell v. Hubbell*, 5 Wis., 662 (62 Am. Dec., 702).

The Legislature of this state has provided (Section 11980, General Code), that the courts of this state--

“Shall hear and determine the case whether the marriage took place or the cause of divorce occurred within or without the state.”

A resident of the state whose cause is authorized by the provisions of the section just referred to, has a right to insist that the courts of the state shall determine his legal rights by the laws of the state.

A divorce granted to a *bona fide* resident of this state is binding within the state on both the husband and wife although the marriage contract was entered into in another state, and the wrongful acts which authorized the divorce were also committed therein, even if the defendant is only served by publication under the statutes of this state.

It is true that such a judgment would not be entitled to obligatory enforcement in other states under the full faith and credit clause of the Federal Constitution, but it may be given such degree of efficacy under the principles of comity as their own conception of duty and public policy may require. *Howard v. Strode*, 242 Mo., 210 (146 S. W., 792); *Felt v. Felt*, 59 N. J. Eq., 606 (45 Atl., 105); *Buckley v. Buckley*, 50 Wash., 213 (96 Pac., 1079); *Joyner v. Joyner*, 131 Ga., 217 (62 S. E., 182).

The plaintiff in this case, under the finding of the court entered in the judgment, was entitled to a divorce, and we think that the court should not have dismissed the petition, but granted her a divorce as prayed for.

The judgment of the court below is reversed, and remanded for further proceedings according to law.

METCALFE, P. J., and FARR, J., concur.

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Lucas County.

REGULATION OF THE WEIGHT OF LOAVES OF BREAD.

Court of Appeals for Lucas County.

TOLEDO (CITY) v. ALLION.*

Decided, December 24, 1917.

Police Power—Regulation of Bakers—Minimum Weight of Loaves of Bread May be Prescribed.

A city ordinance, enacted to regulate the manufacture and sale of bread by bakers, and establishing one pound avoirdupois as the minimum weight of a loaf of bread that may be manufactured and sold by bakers, is not so unreasonable or arbitrary as to violate any constitutional provision.

H. S. Commager, director of law, and C. T. Lawton, for plaintiff in error.

George A. Bassett, contra.

R. S. Holbrook and C. R. Banker, amici curiae.

RICHARDS, J.

Clara Allion, who is engaged in a small way conducting a bakery in the city of Toledo, was convicted in the police court of that city of the violation of an ordinance which fixes at one pound avoirdupois the minimum weight of a loaf of bread, which may be made or procured for the purpose of sale, sold, offered or exposed for sale in the city of Toledo. She prosecuted error to the court of common pleas, where the judgment was reversed, and the city brings this proceeding in error for the purpose of securing a reversal of the judgment rendered in the court of common pleas.

The validity of the ordinance is assailed on the ground that it contains more than one subject, and that it amounts to an unjust and arbitrary interference with the property rights

*Reversing *Allion v. Toledo*, 20 N.P.(N.S.), 353; judgment of the Court of Appeals affirmed by the Supreme Court, 99 Ohio State, 416.

of the defendant in error and is therefore unconstitutional and void.

The ordinance is entitled, "An ordinance regulating the size of the loaves of bread to be sold within the city of Toledo," and it provides, in substance, that all bread made or procured for the purpose of sale, sold, offered or exposed for sale shall be made in a clean and sanitary place and of good, wholesome flour or meal and shall contain no deleterious substance. The ordinance further provides that one pound avoirdupois shall be the standard loaf of bread, and that bread may be made or exposed for sale in one, one and one-half, two, two and one-half, three, three and one-half, four, four and one-half, five, five and one-half and six pound loaves, and in no other way, and requires that every loaf shall have affixed in a conspicuous place a label of a given size and type, stating the weight of the loaf, marked in pounds, and the address of the baker. The ordinance further provides that the seller of bread shall keep on hand scales and weights suitable for the weighing of the bread, which shall be weighed in the presence of the buyer whenever requested by him. The ordinance by its terms does not apply to stale bread.

We do not think the ordinance is justly subject to the objection that the title does not contain all of the subject-matter placed in the ordinance. All matters covered by the ordinance are germane to the title of the ordinance as set forth. *Chittenden v. Columbus*, 26 O. C. C., 531 (5 N. S., 84), affirmed without opinion, 71 Ohio St., 477 (74 N. E., 1134).

The chief objection made to the validity of this ordinance is that it forbids the manufacture or sale of bread weighing less than one pound per loaf. The evidence shows that the loaf of bread which the defendant sold, and which resulted in her prosecution, weighed eleven and three-fourths ounces. It further shows that she has been engaged in the making and sale of six-cent and twelve-cent loaves of bread. That the six-cent loaf weighed generally between eleven and eleven and one-half ounces and that the twelve-cent loaf weighed ordinarily twenty-one and one-half ounces. The record further shows that in the

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conduct of her business she made and sold many more of the six-cent loaves than she did of the twelve-cent loaves, and hence it is claimed that the ordinance in prohibiting the making or selling of a loaf weighing less than one pound unreasonably interferes with the conduct of her business.

Article 18, Sec. 3 of the constitution of Ohio, as amended in 1912, authorizes municipalities to exercise all powers of local self-government and to adopt and enforce such local police, sanitary and other similar regulations as are not in conflict with the general laws. The city of Toledo has adopted a municipal charter, which provides in Chap. 2, Sec. 8, that the city shall have power to license and regulate persons, corporations and associations engaged in any lawful business, occupation, profession or trade. The city claims to have enacted this ordinance by virtue of the authority so vested in it by its charter adopted under the constitution.

The principle that municipalities have the authority to regulate the manufacture and sale of bread and fix the weight of loaves of bread has been announced in innumerable authorities found both in textbooks and judicial decisions. Indeed, the principle is so well settled that it could not be and is not questioned by counsel for the defendant. But it is said, and well said, that the ordinance regulating the manufacture and sale should be reasonable, and not arbitrarily interfere with the right of the individual. It is contended that the provision in the ordinance under consideration forbidding the manufacture or sale of bread, when made into a loaf weighing less than one pound, is an unjust and arbitrary interference with the rights of the citizen.

In an investigation of the question under consideration we have been aided not only by oral arguments, but by briefs of counsel, which have carefully reviewed the authorities. After a somewhat extended examination we have not found the rules of law governing cases of this character better stated than in 11 Ruling Case Law, 1115, where, in a foot-note, most of the authorities are collected.

The case of *Chicago v. Schmidinger*, 243 Ill., 167 (90 N. E.,

369; 44 L. R. A. [N. S.], 632; 17 Ann. Cas., 614), is an important one bearing on the issue in this case. It is said in argument that the Toledo ordinance is in the main a copy of the Chicago ordinance, but it is manifest that the two ordinances differ in at least one very important respect, namely, the Chicago ordinance fixed a pound avoirdupois as the standard weight of a loaf of bread, but authorized the manufacture and sale of bread in half, three-quarter, double, triple, quadruple, quintuple and sextuple loaves, while the Toledo ordinance forbids the manufacture and sale of any loaf weighing less than one pound. Nevertheless the principles discussed by the court in the case just cited shed much light on the validity of the ordinance now under review. The case ultimately found its way to the supreme court of the United States and is reported under the title of *Schmidinger v. Chicago*, 226 U. S., 578 (57 L. Ed., 364; 33 Sup. Ct., 182).

There is undoubtedly in Toledo, as shown by the record in this case, a demand for bread of a weight less than that fixed by this ordinance. But it was said in the *Schmidinger* case that there was a considerable demand in Chicago for bread in weights differing from those fixed by the ordinance, and the fact of that demand was held not to be sufficient to invalidate the ordinance, which was sustained by the Supreme Court of Illinois and by the Supreme Court of the United States.

Of course it is manifest that mere inconvenience in complying with the terms of an ordinance fixing the weight of bread is not sufficient to justify a court in holding the ordinance void. We suppose the rule to be well settled that city councils, rather than the courts, are entrusted with the regulation of these matters, that the local authorities are primarily the judges of the necessity calling for the legislation, and that the courts are powerless to interfere unless the regulations are so arbitrary as to be in excess of any reasonable exercise of authority.

Mr. Justice Day, in delivering the opinion of the supreme court in the *Schmidinger* case, quotes the following from *Gundling v. Chicago*, 177 U. S., 183, 188 (44 L. Ed., 725; 20 Sup. Ct., 633); "Unless the regulations are so utterly unreasonable

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and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

The rule is well stated, in language nearly parallel to this, in 12 Corpus Juris. 932.

A conviction under a bread ordinance adopted by the city of Detroit, fixing the weight of loaves of bread at one pound, two pounds and four pounds *avoirdupois* weight, and forbidding loaves of any other weight, was sustained in the *People v. Wagner*, 86 Mich., 594 (49 N. W., 609; 13 L. R. A., 286; 24 Am. St., 141). The Detroit ordinance in this vital particular was identical with the one adopted in the city of Toledo, under which the defendant is prosecuted.

It was held in *State v. Huber*, 27 Del. (4 Boyce), 259 (88 Atl., 453), that an enactment prohibiting the sale of bread by the loaf weighing less than one pound *avoirdupois* is a proper exercise of the police power and not unconstitutional for unreasonableness as abridging the privileges and immunities of citizens.

Similar decisions have been rendered in the province of Ontario in two cases: *In re Nasmith and the Corporation of the City of Toronto*, 2 Ontario Rep., 192, where the minimum loaf was fixed at one pound, and *Rex v. Chisholm*, 14 Ontario Law Rep., 178, where the minimum weight of the loaf of bread was fixed by the ordinance at one and one-half pounds.

See also the following authorities: *State v. McCool*, 83 Kans., 428 (111 Pac., 477), and *State v. Armour & Co.*, 27 N. Dak., 177 (145 N. W., 1033; 1916E L. R. A. [N. S.], 380; 1916B Ann. Cas., 1149), affirmed by the Supreme Court of the United States, 240 U. S., 510 (36 Sup. Ct., 440).

The latter case was a prosecution for the violation of a statute requiring every lot of lard or lard compound, unless sold in bulk, to be put in pails or other containers holding one, three or five pounds, net weight, or some multiple of those

numbers. The statute did not prohibit the sale of lard in bulk in any quantity.

Our attention has been called to but one case which reaches a conclusion contrary to the authorities already cited. We refer to *Buffalo v. Collins Baking Co.*, 57 N. Y., Supp., 347, where it was held that an ordinance regulating the weight of baker's bread is void as being an unreasonable invasion of the right to engage in a lawful business. It is manifest that this decision is clearly contrary to the great weight of authority and not in accordance with the reasoning of either the courts or the authors of textbooks on the law. We are the less impressed with this authority by reason of the fact that the Supreme Court of New York had theretofore held in the case of *Paige v. Fazackerly*, 36 Barb. (N. Y.), 392, 394, that there is no doubt that a city ordinance regulating the weight of bread is a valid police regulation.

It may be noted that the ordinance of the city of Buffalo, which was held invalid in the case of *Buffalo v. Collins Baking Co.*, *supra*, fixed the minimum weight of a loaf of bread manufactured for sale by any baker at one and one-half pounds.

We are forced to the conclusion that the city council was primarily the judge of the necessity of enacting this ordinance and that this court can interfere only when it shall appear that the ordinance passed in pursuance of the police power is so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of that power. While it is evidently true that compliance with this ordinance will work some hardship on the defendant, and others similarly situated, yet we can not find that the ordinance is beyond the exercise of the legislative discretion vested in the city council, nor that it is so unreasonable and arbitrary an exercise of the police power as to be void. In reaching this conclusion, however, we wish to say that in so far as the ordinance prohibits the baking and sale of bread in loaves weighing less than one pound, and in particular in not allowing half-pound loaves, it does not appear to be a wise exercise of the legislative power vested in the city. The record in this case discloses that not only the defendant in error, but

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others similarly situated, and many citizens of the city of Toledo, would be accommodated if the ordinance should permit the manufacture and sale of a loaf weighing as little as one-half pound. If the ordinance permitted a loaf weighing one-half pound the enactment would be beyond criticism and far more satisfactory to the members of this court.

In this connection, however, we call attention to the language of Mr. Justice Harlan, as found in *Powell v. Pennsylvania*, 127 U. S., 678, 686 (32 L. Ed., 253; 8 Sup. Ct., 992, 1257):

“If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling * * * an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government.”

Certainly Mr. Justice Harlan did not undertake to say, nor do we say, that the city council may exercise power in this respect either arbitrarily or capriciously.

The Supreme Court of Illinois said in *Chicago v. Schmidinger*, 243 Ill., 167, 174, *supra*: “The courts have nothing to do with the wisdom of this ordinance. That question rested entirely with the city council of the city of Chicago. While its provisions may be drastic, we do not think the ordinance is unconstitutional or that it is unreasonable and therefore void.”

While the ordinance adopted by the city of Toledo does not meet with the approval of this court, in so far as it prohibits the manufacture and sale of bread weighing less than a pound, it is not so arbitrary or unreasonable as to be unconstitutional and void, and is within the police power vested in the city authorities.

CONTRACTS FOR THE SALE OF REAL ESTATE.

Court of Appeals for Cuyahoga County.

HALLIDAY V. DIEHM.

Decided, February 7, 1919.

Option on Real Estate—Holder Can Not Maintain Suit Against Third Party for Breach of Contract—Where Deed Has Not Been Tendered.

A party who has no title to a certain piece of real estate, but holds merely an option thereon, given without consideration, by entering into a contract for the sale of such property to a third party, does not thereby obtain such rights that upon prompt repudiation of the contract by such third party he may, without tender of a deed and without acquiring any title to such property, sue and recover from such third party damages as for a breach of such contract.

Reed, Meals & Eichelberger and Turney, Olds & Sipe, for plaintiff in error.

Squire, Sanders & Dempsey, contra.

DUNLAP, J.

Heard on error.

We think that in the final analysis the sole question for our determination in this case is:

“Can a person who has no title to a certain piece of real estate, and who has merely an option to buy the same, given without consideration, by entering into a contract with a third party for the sale to such third party of such property thereby obtain such rights that upon prompt repudiation of the contract by said third party he may without tender of a deed and without ever acquiring any title to the property sue and recover from the third party damages as for a breach of said contract?”

No authorities are cited to us which we regard as maintaining the affirmative of this proposition. We are familiar

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with the general holding that the owner of property need not upon absolute refusal of a person with whom he has made a binding contract of sale, do the vain and useless thing of tendering a deed or other performance, but the basis for this holding is the readiness, willingness and ability to perform. Then tender or performance is executed because of its uselessness. The proof of ability to perform, coupled with an expressed willingness, and the absolute refusal of the other party, are sufficient to make out the case. But the refusal alone, without proof of ability, readiness and willingness, or without proof of tender or performance, will not make out a case. This, we believe, is in accordance with the most fundamental principles of the law of contracts. We think it is fundamental that before a party to an executory contract can recover for a breach he must prove his own readiness, willingness and ability to perform his part of the contract. Such showing of readiness, willingness and ability is not excused by a mere proof of a repudiation of the contract by the other party, upon the theory that this showing would be a vain thing. It is only the tender of performance when the other elements are present that constitutes the vain thing.

Any other holding than this would, we think, be against both public policy and good morals. Any impecunious but plausible person with ability simply to obtain colorable options could make contracts for the sale of almost any property and take the gambler's chance that always exist that before the day for the completion of the transaction either the other man would "back out," thereby relieving him from any embarrassing disclosures and giving him an opportunity for a lawsuit, or that he might be able to induce the owner to carry out the terms of his daring contract from which he might reap possible profits. In either event he would have undertaken to perform with certainty something then out of his power to perform, and which only good fortune could enable him to perform. Shall he, under such circumstances, be permitted to recover under his contract, simply upon proof of its repudiation by the other party, without proof of any tender of performance upon his part?

This court is unanimously of the opinion that such is not the law. In our opinion the covenants in the contract in this case were mutual covenants or provisions, and the proof is insufficient unless it reveals a tender of performance upon the part of the plaintiff. Until such time there is no breach of the contract of which he can take advantage.

That this is the law seems to us to be clearly indicated by the very early cases of *Webb v. Stevenson*, 6 Ohio, 283, and *McCoy's Admrs. v. Bixbee's Admrs.*, 6 Ohio, 310 (27 Am. Dec., 258), apparently followed in the more recent case of *Raudabaugh v. Hart*, 61 Ohio St., 73 (55 N. E., 214; 76 Am. St., 361). It is also the doctrine of the text-books. Thus in 39 Cyc., page 1983, the law is stated as follows:

"A vendor, in order to recover for a breach of contract by the purchaser, must himself have been able and ready to perform his part of the contract * * *. Notwithstanding the circumstances may be such as to obviate the necessity of an actual tender or offer of performance, this fact does not dispense with the necessity of an ability and readiness on the part of the vendor to perform."

Again at page 2095, 39 Cyc., it is said:

"The complainant must allege or show an ability and willingness on the part of plaintiff to perform his part of the contract, even where an actual performance or tender is unnecessary; and where an actual performance or tender is a condition precedent, it must be alleged, it not being sufficient in such cases to allege merely a readiness and willingness to perform."

Applying what we think are the fundamental principles of the law of contracts to the facts in the case at bar, we reach the conclusion that the judgment of the court below should be affirmed.

Judgment affirmed.

GRANT and WASHBURN, JJ., concur.

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ALIMONY NOT BARRED BY ANTE-NUPTIAL CONTRACT.

Court of Appeals for Cuyahoga County.

KENNEDY v. KENNEDY.

Decided, May 12, 1919.

Divorce and Alimony—Ante-Nuptial Contract Providing for Support During Coverture Only—Not a Bar to Recovery of Alimony, When.

Where an ante-nuptial contract provided for the support of the wife by the husband during coverture and that if they should cease to live together as husband and wife she should not have any interest in the property owned by him at the time of the marriage, and the husband was guilty of such gross neglect of duty as amounted to an utter failure to perform the contract and resulted in the wife being granted a divorce from him, she is not barred by the ante-nuptial contract from being awarded reasonable alimony.

Kerruish, Kerruish, Hartshorn & Spooner, for plaintiff in error.

Eugene Quigley, contra.

RICHARDS, J.

Heard on error.

Alice L. Kennedy commenced an action for divorce and alimony against her husband, Ellis Kennedy, the trial resulting in a decree granting her a divorce on the ground of gross neglect of duty and awarding her as alimony certain personal property and \$1,500 in money. The husband prosecutes error to so much of the decree as awards the allowance of \$1,500 to the wife as alimony, and contends that by reason of the existence of an ante-nuptial contract between the parties she has no right to an allowance of alimony and also that the evidence does not disclose such conduct on his part as would justify an allowance of alimony.

The evidence on which the trial court found the husband guilty of gross neglect of duty is not very strong, but we can

not say that the finding and judgment are so manifestly against the weight of the evidence in that respect as to justify a reversal of the judgment.

The serious question in this case arises by reason of the existence of the ante-nuptial contract made between the parties immediately before their marriage. Each of the parties had been married before the present marriage, the wife having one child and the husband three children by former marriage. At the date of the marriage involved in this litigation, the wife was 48 years of age and the husband 66.

We are quite aware of the rule that ante-nuptial contracts will be scrutinized closely by the courts in order to ascertain whether the parties thereto fully understood the nature and terms of the same, and the property possessed by each, and whether any improper advantage was taken of either to induce the making of the contract. We find in this case nothing which would indicate any lack of understanding of either party of the terms and conditions of the contract, or any unjust advantage taken of either party. The ante-nuptial contract which they made recites that Kennedy was possessed of property of the value of about \$25,000 and that she was possessed of property of the value of about \$2,500, and he covenanted in the contract to care for and support her out of his income so long as they should be husband and wife. By the terms of this contract he was to have and retain whatever property he was possessed of at the time of their marriage and she was to have and retain such property as she had at that time, but the accumulations after that date should belong jointly to the two parties. The contract contains the further provision that if for any reason the parties should separate and not live together as husband and wife, then she should not take or have any interest whatever in any of the property owned by him at the time of the marriage, but only in such property as should be accumulated by the parties through their joint efforts. The parties lived together as husband and wife for about a year and a half and then separated, there being no children as a result of the mar-

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riage. The trial court having found that the husband was guilty of such gross neglect of duty as entitled the wife to a divorce and alimony, and this court having found that such judgment is sustained by sufficient evidence, it necessarily results that the husband himself was guilty of a breach, not only of the marital relation but of the ante-nuptial contract whereby he had promised to support and care for the wife.

We are confronted then with the direct question whether a valid ante-nuptial contract can bar the allowance of alimony to the wife where the evidence discloses that the husband has been guilty of such gross neglect of duty as is a breach of his marital duties and a breach of the ante-nuptial contract. The authorities on this question are somewhat meager, but they appear to require the conclusion that under such circumstances the existence of the ante-nuptial contract is not a bar to the allowance of alimony. If the contract has not been substantially performed by the husband, then the wife ought not to be barred by such contract of the right to alimony given to her by the statutes of the state. In the case of *Spiva v. Jeter*, 9 Rich. (S. C. Eq.), 434, such a contract, which had been broken by the husband by his abandoning the wife for a term of years, was held not to bar the wife. In the case of *York v. Ferner*, 59 Ia., 487 (13 N. W., 630), a wife who has herself broken an ante-nuptial contract was held to be debarred from a right to recover an annuity provided for in such contract. This case was cited in *Fisher v. Koontz*, 110 Iowa, 498 (80 N. W., 551), which held that a breach of such a contract would not be a bar if the breach had been condoned. In the case of *Becker v. Becker*, 241 Ill., 423 (89 N. E., 737; 26 L. R. A. [N. S.], 858), where the ante-nuptial contract provided that the husband should keep alive for the benefit of the wife a life insurance policy, and he failed to do so, it is held that he had thereby forfeited his rights under the contract. In the case of *Stearns v. Stearns*, 66 Vt., 187 (28 Atl., 875; 44 Am. St., 836), it is held that an ante-nuptial contract providing that neither party should claim any interest in the property which the other had at the time of the

marriage, or might acquire during coverture, would not bar the wife of alimony where the divorce was granted on the ground of wilful refusal of the husband to support her.

These cases sufficiently indicate the trend of authority and the reason upon which such authority is based, and we therefore reach the conclusion in this case that the wife was not barred by this ante-nuptial contract of her right to alimony, based upon the husband's gross neglect of duty, which was a breach not only of the marital contract but of the ante-nuptial contract.

Judgment affirmed.

KINKADE and CHITTENDEN, JJ., concur.

**PAYMENT OF COSTS AND LANDOWNER'S ATTORNEY'S FEES IN
ABANDONED APPROPRIATION PROCEEDINGS.**

Court of Appeals for Franklin County.

NORFOLK & WESTERN RY. V. CAMPBELL ET AL.

Decided, February 19, 1919.

*Appropriation—Failure of Railway Company to Prosecute Proceeding—
Payment of Costs and Landowner's Attorney's Fees Required—
Procedure Where Common Pleas Reverses Probate Court.*

1. When a railroad corporation institutes a proceeding to appropriate real estate and fails to prosecute the same for a number of years, and when the court refuses leave to refile an amended petition which was stricken from the files and to assign the case for hearing upon the original petition, without objection upon the part of the railroad company, a reasonable construction under such circumstances of Section 11060, General Code, would support an order requiring payment by the railroad company of the expenses and attorneys' fees incurred by the property owner.

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2. Where the court of common pleas reverses the judgment of the probate court, which held that a proceeding by a railroad to appropriate land had been abandoned because of failure to prosecute the same, the court of common pleas is not authorized to remand the cause to the probate court, but should retain the cause for trial and final determination.

Error.

Booth, Keating, Pomerene & Boulger, for plaintiff in error.
Smith W. Bennett and Barton Griffith, for defendants in error.

KUNKLE, J.

In brief it appears from the record that in March, 1907, the plaintiff in error, who was plaintiff below, filed a petition in the Probate Court of Franklin County for the purpose of condemning for railroad purposes certain land owned by the heirs of Lorenzo D. English. Answer was filed, and in May, 1907, plaintiff was given leave to amend its petition, and Mary English was made a party defendant. February 21, 1913, leave was granted plaintiff to file an amended petition and the same was accordingly filed. February 26, 1913, leave was granted defendant, Walter English, to file an answer or other pleading, and on February 27, 1913, he filed a motion to set aside the previous order of the probate court granting the plaintiff leave to file an amended petition. In January, 1915, Walter English and others filed a cross-petition.

February 8, 1917, Judge Black of the probate court sustained the motion of Walter English and others and struck the amended petition from the files. The entry as approved by the probate court reads as follows:

“This day this cause came on to be heard upon the motion of the defendants, Walter English, M. K. English, W. H. English and Laura E. Young, to vacate the order of this court permitting the defendants to file an amended petition under date of February 21st, 1913, to set aside said order and that the same be held for naught; and the same was argued by counsel and considered by the court.

“The court upon consideration thereof and being duly advised in the premises doth find that this cause was begun in this court on the 25th day of March, A. D. 1907, by the filing of a petition therein for the appropriation of certain real estate now owned and held by the defendants as the heirs of Lorenzo D. English, deceased. That an amended petition was filed herein February 21st, 1913, in which amended petition it appears that other and additional real estate than that included in the original petition is set forth therein and a prayer for the appropriation of such additional real estate for railway purposes is therein contained. That the lands described in said amended petition are different in amount and description from those included in said original petition.

“It is, therefore, by the court ordered and adjudged that the amended petition of said plaintiff filed herein February 21st, 1913, be stricken from the files and that the order authorizing the same to be filed be vacated, set aside and held for naught; to all of which the plaintiff, The Norfolk and Western Railway Company, by its counsel, excepts.”

Plaintiff thereupon requested that it be allowed to refile its amended petition, which request was refused, and the plaintiff then asked that the case be heard on the original petition. Defendants thereupon filed a motion asking the court to dismiss the original petition, which motion was submitted to Judge Bostwick of the probate court in June, 1918, and the petition was dismissed at the costs of plaintiff without prejudice to a new action.

This entry reads as follows:

“This day this cause coming on for hearing upon the motion of the defendants to dismiss this proceeding, the plaintiff asked leave to refile the amended petition heretofore stricken from the files, which leave, upon consideration, the court denies; thereupon the plaintiff asked that this proceeding be set down for hearing upon the petition and it appearing to the court that the plaintiff contends that it requires from the defendants, Walter English, M. J. English, W. H. English and Laura Young, for the purposes of its railroad real estate in addition to that described in the said petition, this proceeding is hereby dis-

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missed without prejudice and without record at the cost of the plaintiff.”

Defendants thereupon filed a motion asking the court for an allowance of attorneys’ fees and expenses, as provided by Section 11060, General Code.

The probate court sustained a motion of the plaintiff and dismissed the motion of defendants asking for an allowance for attorneys’ fees and other expenses incurred.

Error was prosecuted from such judgment of the probate court to the court of common pleas. The common pleas court reversed the judgment of the probate court and remanded the case to the probate court.

Plaintiff in error now prosecutes error to this court from the judgment of the court of common pleas reversing the judgment of the probate court.

In brief, the questions presented for consideration relate to the jurisdiction of the common pleas court to reverse the probate court, in holding that the proceeding in appropriation was not abandoned, and to remand the case to the probate court; and the further question whether a case can be considered as having been abandoned when the proceeding was dismissed on the motion of the defendants.

The motion filed by defendants below to dismiss the action reads in part as follows:

“*First:* The proceeding is one which creates a lien of record against the real estate of the said defendants and the same is and has been a source of damage to the defendants by reason of the pendency of the action.

“*Second:* That the said plaintiff has not proceeded with diligence to prosecute the same to final judgment.

“*Third:* That the plaintiff has not proceeded to have the preliminary questions adjudicated and determined by this court, as required by the Statutes of Ohio, as necessary to be done in such actions and proceedings, and within the period of time as fixed by Section 11046, General Code.

“*Fourth:* That this court has lost jurisdiction to determine the questions herein involved by reason of the negligence of the

plaintiff to prosecute its action with diligence and within the period of time required by the statutes of Ohio."

We have carefully considered the authorities cited by counsel and will not attempt to discuss or distinguish the same, but will merely announce the conclusion at which we have arrived after an examination of the record and such authorities. We have also read the opinion of Judge Kinkead of the common pleas court, which has been filed with us, and in the main we are in accord with the reasoning contained therein.

Section 11060, G. C., provides that "the corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses and attorney fees, as found by the court."

In addition to the reasons stated in the entry sustaining the motion to dismiss the proceedings, the probate court may have been moved to do so because of the failure of the plaintiff to prosecute its action. The failure to prosecute a case may be equivalent to an abandonment of the case. The case had been pending about six years when the plaintiff secured leave to file an amended petition, setting forth the fact that the necessities of the road required real estate in addition to that described in the petition. The case had been pending about eleven years when the probate court ordered the amended petition stricken from the files, and had been pending more than eleven years when the probate court dismissed the proceeding.

It appears from the entry dismissing the proceeding that the plaintiff did not except to the judgment of the probate court, rendered July 12, 1918, refusing leave to refile its amended petition which had previously been stricken from the files and refusing to set the case down for hearing upon the petition.

In the absence of such exception, we think the fair inference would be that plaintiff was satisfied with the ruling of the court, and that such ruling might be considered as equivalent to a dismissal of the action for want of prosecution, as the court was authorized to do under the provisions of Section 11585, General Code.

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This section reads as follows:

“The court may dismiss the petition with costs in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendants served.”

We are of opinion that under the facts disclosed by the record the fair and reasonable construction of Section 11060 would require the payment by the plaintiff in error of the expenses and attorneys' fees of defendants in error.

Section 11066 provides:

“Upon the hearing of the cause, if the common pleas court affirms the judgment of the probate court, all the costs in the common pleas court shall be paid by the plaintiff in error. If it reverses such judgment, it shall retain the cause for trial and final judgment, as in other cases.”

Under the provisions of this section we think the court of common pleas should have retained the case for final determination instead of remanding the same to the probate court.

The judgment of the court of common pleas will therefore be modified in this respect and as so modified will be affirmed.

Judgment modified, and affirmed, as modified.

ALLREAD and FERNEDING, JJ., concur.

EMPLOYEE INJURED BY THE BURSTING OF AN EMERY WHEEL

Court of Appeals for Cuyahoga County.

FRED NAPOLI V. THE STANDARDS PARTS COMPANY.

Decided, October 17, 1919.

Proximate Cause—May Not be Determined by the Court Without the Facts—Where the Issue is Made by the Pleadings.

In an action for recovery of damages on account of injury to a workman from the bursting of an emery wheel which he was operating, the question whether an accident of that character can be attributed to the failure of the employer to comply with the statute requiring that such wheels be covered with a sheet or cast iron hood or hopper to prevent dust or refuse from rising therefrom, is one which should be determined by the jury from the facts and circumstances of the case, rather than from any narrow construction by the court of the purpose of the law, and the plaintiff in such a case should be given an opportunity to prove that the cause of his injury was the absence of such an appliance.

Gilbert Morgan, Attorney for plaintiff.

Day, Day & Wilkin, Attorneys for defendant in error.

WASHBURN, J.

Heard on error to the Court of Common Pleas.

This was an action in which Fred Napoli sought to recover damages for an injury received while in the employ of the Standard Parts Company. The injury was caused by the bursting of an emery wheel, a piece of which struck him in the throat. The Standard Parts Company employed more than five employees and complied with all the requirements of the Workmen's Compensation act.

Napoli, therefore, could not maintain such suit unless such injury arose from the failure of such employer to comply with a lawful requirement for the protection of the lives and safety of employees. General Code, Section 1465-76. Napoli claimed that

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such was the case, and that the injury to him was caused by the failure of the Standard Parts Company to comply with the requirements of Section 1027, which required the emery wheel in question to be provided "with a sheet or cast iron hood or hopper of such form and so applied to it that the dust or refuse therefrom will fall from such wheels or will be thrown into such hood or hopper by centrifugal force and be carried off by the current of air into a suction pipe attached to such hood or hopper."

The case came on for trial, and the court sustained an objection to any evidence and rendered judgment for the Standard Parts Company on the ground that the lawful requirement referred to was for the purpose of protecting its employees from dust or refuse and not from the bursting of the emery wheel.

It must be conceded that Section 1027 requires the installation of dust or refuse removing apparatus, but Napoli claimed that if such apparatus had been provided, it would have not only have protected him from dust and refuse from said emery wheel, but would also have protected him from injury from the bursting of the emery wheel—in other words, that the absence of such apparatus was the proximate cause of his injury.

No evidence having been permitted, we have no facts before us by which we can form any opinion as to whether or not such apparatus would have afforded him any protection from injury from the bursting of said emery wheel.

Proximate cause is usually a mixed question of law and fact for a jury to determine, and in no event can a court determine it without any facts where the issue is made in the pleadings.

So that this case falls within the familiar rule that evidence as to this issue should have been permitted, unless the contention of the Standard Parts Company is correct,—that the statute being for the purpose of preventing injury from dust or refuse, it can not, as a matter of law, be considered as a lawful requirement for any other purpose. We can not accede to that proposition. If an apparatus is required which will afford protection against a certain kind of injury, and if it will also protect against another kind of injury, we perceive no good reason why it is not a lawful requirement as to both kinds of injuries.

Whether or not this apparatus would have afforded protection against injury from the bursting of the emery wheel, and whether or not the injury in this case was caused by the employer's failure to provide such apparatus, is the very question at issue which we hold should be determined upon the facts rather than by a narrow construction of the purpose of the law.

We are cited to former decisions of this court holding that a statute requiring certain machinery to be protected by a guard to prevent the operator *coming in* contact with the machinery did not require guard to prevent parts of the machinery from *flying off* and injuring the operator. *The Marble & Shattuck Chair Company v. Frances Dubroy, Administratrix*, 17 C.C.(N.S.), 515. That case differs from the case at bar in that the facts were before the court, and it further appears that the court found that "it would be impossible to conceive" of the machine being so guarded that the accident "would or might not have happened." It is apparent that the facts in that case disclosed to the court that the guard required could not have prevented the accident, and that, therefore, failure to have the guard could not be the proximate cause of the accident.

We are also cited to another case in which this court determined the same law requiring a guard to prevent injury to persons *coming in contact* with machinery does not require such machinery to be so guarded as to prevent injury from material or particles being *thrown off* from such machinery. *Kump v. Kilby Mfg. Co.*, 18 C. C. (N. S.), 463. But the evidence was also before the court in that case, and moreover, after the first case cited above was decided the Legislature made a significant change in the statute by requiring that guards and appliances be provided to "prevent injury to persons who *use* or come in contact with machinery." That is now the language of the law declaring the purpose of the lawful requirement in the case at bar.

The purpose is to prevent injury to persons who use or come in contact with machinery, not any particular kind of injury but injury generally, any injury which the appliances required would prevent.

Our attention is also called to another case decided by this

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court holding a violation of a statute prohibiting the employment of a minor to operate an elevator can not be the proximate cause of injury to the minor,—*Schauer, etc., vs Hinig*, 18 C.D. (N.S.), 414.

That case presents a much different question than is presented by the case at bar, and it is to be noted that in that case also the facts were before the court, and, moreover, it does not appear that in deciding the case it was necessary to promulgate the above proposition of law; in fact a judgment for plaintiff was affirmed in that case.

We are further cited to a case decided by the circuit court of Hamilton county,—*Slaline v. Cincinnati Sand Blast Company*, 12 C.C.(N.S.), 208. In that case, as in all of the other cases cited, the facts were before the court. None of them sustain the proposition that where the issue of proximate cause is made by the pleadings, the trial court, without any facts, can determine that issue. In the case at bar, the petition liberally construed, alleges that the statute required protecting appliances to be attached to the emery wheel in question for the purpose of preventing injury to plaintiff, and that the absence of such appliances was the cause of plaintiff's injury. These allegations were denied in the answer. The plaintiff should have been given an opportunity to prove that the absence of the required appliances was the cause of his injury, and for error in sustaining the objection to any evidence and rendering judgment for the defendant, the case is reversed and remanded for further proceedings according to law.

DUNLAP, P. J., and VICKERY, J., concur.

WARRANTY OF A HORSE.

Court of Appeals for Muskingum County.

HARLEY E. WARNE v. HERMAN T. BOND.

Sales Act—What Constitutes Express Warranty—Representations by a Seller as to the Soundness of the Horse Sold.

Assurances given the purchaser by one selling a horse, that the animal was sound in every way and especially was free from any disease of the eyes and that both of the eyes of said horse were sound, are sufficient to constitute an express warranty under the sales act.

Harry C. Shepherd for plaintiff in error.

H. W. Kuntz contra.

HOUCK, J.

This case is here on a petition in error and a bill of exceptions from the common pleas court of Muskingum county. The plaintiff in error here was the defendant below. The issues raised by the pleadings in the trial in the lower court are as follows.

The petition alleged a warranty of the soundness of a horse sold by Warne to Bond, a breach of said warranty, and as a result thereof damages to said Bond in the sum of \$125.

The answer contained two defenses: first, a general denial; second, that at the time Bond purchased said horse of Warne, he knew the eyes of said horse were defective.

The reply denied the second defense of the answer. Upon these issues the cause was submitted to a jury and a verdict was returned in favor of Bond for the sum of \$90. The trial judge overruled a motion for a new trial and entered a judgment on the verdict.

Counsel for plaintiff in error urges that an inspection of the record will disclose the following errors prejudicial to the rights of his client, and seeks a reversal of said judgment so entered:—

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(a) That there was no legal proof establishing the alleged warranty.

(b) That the trial court erred in its admission and rejection of testimony.

(c) That the judgment is against the weight of the evidence.

We have read the entire record in this case and, therefore, are familiar with the proven facts as well as the rulings of the trial judge, on his admitting and refusal to admit certain testimony offered during the progress of the trial.

As to the first ground of alleged error, will say that the recovery in this case is based upon an express warranty in this, to-wit: that the horse in question was sound in every way and especially was free from any disease of its eyes and that both eyes of said horse were sound. Express warranties are those stipulations and promises, with regard to the condition or general or particular qualities of the article or property sold, which the seller makes to the buyer in express terms, at the time of the sale.

It is claimed that the words and language used by the seller, at the time of the transaction, were not sufficient, in law, to constitute an express warranty. The law does not draw a close line in this respect; no particular words are necessary. Any language, statement, assertion, or act on the part of the seller, in the present case, going to the soundness of the horse in question, if they were intended by Warne, and understood by Bond, as a warranty as to the soundness of said horse, must be considered as such.

The question is, did the words and language used, at the time of the sale, fairly and reasonably indicate an intention, on the part of Warne, to warrant the horse sound, and did Bond so understand it? This was a question of fact and entirely within the province of the jury and for its determination. This was done, and we think its response is in full accord with the facts and the law.

The testimony of Warne, the defendant below, clearly was such as to satisfy the jury as to the warranty as claimed by Bond.

We hold that, in fact and law, an express warranty was es-

tablished. The "Sales Act," Section 8392 General Code, reads:

"An affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

• • •

This statutory rule of law, when applied to the undisputed facts now before us, is decisive of the real question presented, namely: Was there an express warranty as to the soundness of the horse? and but one answer can follow, Yes.

How stands the claim as to the second alleged error:

An inspection of the record here presented satisfies us that no prejudicial error exists as to the rulings of the trial court in the admission and rejection of testimony.

As to the third ground of error, is the judgment, as entered here, against the weight of the evidence? This we answer in the negative. The judgment is amply supported by the facts as well as the law is applicable to them.

The record being free from prejudicial error, the judgment of the common pleas court must be and hereby is affirmed.

Judgment affirmed.

SHIELDS, J., and PATTERSON, J., concur.

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KNOWLEDGE OF RISK AND ASSUMPTION THEREOF.

Court of Appeals for Cuyahoga County.

NEW YORK, C. & ST. L. RY. v. PUGH.

Decided, February 7, 1919.

Negligence—Brakeman Injured in Switching Yard—By Car “Kicked” on Parallel Track—Degree of Danger Arising from “Kicking” Cars a Question for the Jury—Burden of Proof as to Assumption of Risk on the Employer—Knowledge of Risk a Prerequisite to its Assumption.

1. Where in an action by a railway brakeman for injuries caused by cars being “kicked” by another crew onto another switch in close proximity to the one on which he was operating, the evidence of plaintiff’s knowledge of the custom of “kicking” cars is in conflict, the question of plaintiff’s assumption of the risk is one for the jury.
2. The burden of proof as to assumption of risk is on the employer, and unless the evidence indisputably shows such assumption the question is one for the jury.
3. An employee is not to be regarded as having assumed a risk until he becomes aware of it, unless it be so plain that he must be presumed to have had knowledge of it.

M. B. & H. H. Johnson, for plaintiff in error.

Payer, Winch, Minshall & Karch, for defendant in error.

WASHBURN, J.

This is an action under the Federal Employers’ Liability Act, which, so far as this case is concerned, did not abolish the defense of assumption of risk.

The defendant in error, Clinton F. Pugh, was in the employ of the plaintiff in error, The New York, Chicago & St. Louis Railroad Company, as a brakeman. He suffered certain injuries and brought this action to recover damages therefor. In

*Motion to require the Court of Appeals to certify the record in this case overruled by the Supreme Court, June 10, 1919.

the court below the trial resulted in a verdict and judgment in favor of defendant in error for twenty-five thousand dollars.

The contention of the plaintiff in error is that the jury was not justified in finding that it was negligent in the particulars which the court below submitted to the jury, and that, if the jury was justified in finding such negligence, the defendant in error, being fully aware of all the circumstances, assumed the risk, and the court erred in submitting the question of assumed risk to the jury and not entering a judgment on that ground in favor of the plaintiff in error. This court is urged to find and declare upon the record that the defendant in error as a matter of law assumed the risks attendant upon the methods of operation employed by the plaintiff in error in the transaction of its business.

The evidence submitted tended to establish that the plaintiff in error in making up its trains in its Buffalo switch yards did so by an operation commonly called short-switching. There was one lead track at either end of the switch yards, and between the lead tracks, and substantially parallel with each other, ran the switch tracks, which at their extremities opened into the lead tracks by means of switches. The practice was that when a train of cars was pushed upon a lead track by an engine, the forward car or cars which were to be placed upon a certain switch track were kicked in upon the track, and the cars so kicked in were not usually ridden in by a brakeman, but traveled under the momentum of the kick until they stopped by reason either of loss of momentum or by running against other cars already kicked in on the same switch track.

The evidence tended to establish that this system of operation in said switch yards had continued for more than twenty years, and was substantially a continuous process twenty-four hours a day every day in the year, and that it was not usual to have a man or a light on the cars so kicked in, although under some circumstances there was a man or a light on them.

The defendant in error was not employed in said yards. He was a road brakeman, and had been in the employ of the company continuously from November 3, 1914, to the night of

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his injuries, December 30, 1916. He operated between the city of Conneaut in Ashtabula county, Ohio, and the city of Buffalo, and made a round trip between these two points on an average of every two days. He had nothing to do with switching in the yards, his duty ending when he delivered his train at the yards and beginning again when he took his train out of the yards, but the testimony showed that he must necessarily, and did, spend some time each trip in and about said yards.

On the night of December 30, 1916, at about 9:30 o'clock, he was taking check of a train of cars standing on switch track number 4 in said yards, the same being the train which he was about to take out on a trip. It was winter time and there was snow and ice between the tracks. In the regular course of his duties as brakeman he was taking down the numbers of the cars in said train, and to do so it became necessary for him to step between two of the cars of said train so as to get the number of one of the cars, and as he stepped out from between the cars he either stepped upon or dangerously near the adjoining track, number 3, or slipped and fell toward said tracks just at the time when a car standing on said track was moved forward in said kicking process, and he was thereby seriously injured. Said car had been standing there about one hour, and there was a discrepancy in the evidence as to whether said car was moved forward by being hit by cars kicked in on that track, or whether cars had been coupled to said standing car and then all of them kicked forward; but it is apparent that in any event, the string of cars which injured defendant in error was not at the time of the injury coupled to or being pushed by an engine.

There were several specifications of negligence in the petition, such as maintaining tracks 3 and 4 in too close proximity, and in not having the yards lighted, and in permitting snow and ice to accumulate between tracks 3 and 4. The court instructed the jury that the defendant in error assumed the risks in reference to all of these specifications of negligence. There was, however, another specification of negligence, to-wit, that the railroad company was negligent in kicking down along switch track number 3 a cut of cars without having a man or a

light upon the leading end of the leading car of said cut of cars to give warning of the approach; that is, that in this particular the plaintiff in error, under all the circumstances, was negligent in its mode and manner of transacting its business in said yards. This presented a mixed question of law and fact which was fairly submitted to the jury, and under the familiar law applicable to such a situation we can not say that the jury was manifestly wrong in finding plaintiff in error negligent.

It is insisted, however, that the defendant in error at the time of said accident, and prior thereto, knew the physical conditions then existing, and the methods of operation which were employed at said place, and that as a matter of law he assumed all the risks attendant upon that mode and manner of conducting the business of plaintiff in error.

The question of assumed risk thus presented was submitted to the jury under a charge concerning which no exception is taken, nor is any criticism made of the charge. The important question, the one dwelt upon in the argument and in the briefs of plaintiff in error, is that the facts established such a situation as to place the assumption of risk upon the defendant in error as a matter of law.

Our attention is called to the fact that the defendant in error was an experienced brakeman, that he was in and about said yards several times each week, both night and day, for a period of over two years, and that during all of said time this method of kicking cars without having a man or a light upon the same was the usual way in which the business was conducted, and it is claimed that, therefore, he must have known that that was the customary and ordinary and usual way in which such operations were conducted.

Our attention is also called to the fact that one of the rules of the company, with which the defendant in error was familiar, provided that when cars were being pushed by an engine a flagman must be stationed in a conspicuous position on the front of the leading car, or a white light must be displayed on the front of the leading car at night, and that this rule contained an exception making it applicable under all situations except in

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making up trains in the yard—the inference being that as the rules did not require a brakeman or a light on the front end of the car, except outside of the yards, none was required or could be expected inside of the yards.

The defendant in error testified that he was not familiar with the operations in said yard, and that while he knew that in some instances cars were kicked into said switches in the daytime, he did not know of and never saw such operation in the night time without a light being displayed on the leading car; that just before the accident he saw the car standing still on track 3 and had no reason to expect that it would be suddenly moved without warning and without any light being displayed on or about it.

The question of the defendant in error's knowledge of the situation and assumption of the risk was submitted to the jury under instructions which fairly and fully guarded and protected the rights of the plaintiff in error, and the jury found on this issue in favor of the defendant in error.

It is easy to state the law upon this subject of assumed risk; the difficulty arises in the application of the law to a particular case.

The Supreme Court of the United States, in a very recent case, *Boldt v. Pennsylvania Ry.*, 245 U. S., 441, construing the Federal Employers' Liability Act, under favor of which this action was brought, states the law thus:

“Except in the cases specified in Section 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him.”

The jury having found that the injury in the case at bar was due to the negligence of the employer, the concrete question is: Were the risks due to such negligence “obvious or fully known and appreciated” by the defendant in error?

As the injury did not arise in connection with a stationary condition, but grew out of an operation, the risk assumed depends upon the knowledge, either actual or presumed, of the

defendant in error. As has been said, that question was determined by the jury in favor of the defendant in error. That finding of the jury and the approval thereof by the trial court can not be disturbed by us unless the evidence indisputably shows that the jury was wrong in its finding. While a servant will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to be acquainted with all risks which to a person of his experience and understanding are or ought to be open and obvious, yet where there is any doubt whether the servant was so acquainted, or ought so to have been, the determination of the question is necessarily for the jury.

“1. Where, in an action by a railroad switchman for injuries caused by cars being ‘kicked’ by another crew into those which he was attempting to couple, the evidence as to plaintiff’s knowledge of this custom of kicking the cars on the track in question was conflicting, it was error to refuse to submit to the jury the question as to plaintiff’s assumption of the risk.”

Hartley v. Chicago & A. Ry., 197 Ill., 440.

“The burden of proof of assumption of risk is on the employer, and unless the evidence indisputably shows such assumption, the trial court does not err in refusing to take that question from the jury.” *Kanawha & Mich. Ry. v. Kerse*, 239 U. S., 576.

“An employee is not to be regarded as having assumed a risk attributable to the employer’s negligence until he becomes aware of it, unless it is so plainly observable that he must be presumed to have knowledge of it.” *Chesapeake & O. Ry. v. Proffitt*, 241 U. S., 462.

This presumption of knowledge does not arise unless the defective condition and the risk were so obvious, and the employee’s relation thereto so close and intimate, that he could not help but have known of them. If he denies knowledge, his relationship to the defect and risk must be so close and intimate as to make his denial of knowledge in effect a denial of a physical fact, before the presumption can prevail. *Cincinnati, N. O. & T. P. Ry. v. Thompson*, 236 Fed., 1. See also *Arenschild v. Chicago, R. I. & P. Ry.*, 128 Ia., 677.

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The duty of the reviewing court in reference to the finding of a jury on the question of assumption of risk is similar to the duty of a reviewing court as to the finding of a jury on the subject of contributory negligence. In *Cincinnati Street Ry. v. Snell*, 54 Ohio St., 197, the law as to the latter question has been stated by the Supreme Court as follows:

“And where in such case the question as to whether or not the plaintiff exercised his faculties of seeing and hearing before attempting to cross is in issue, and the oral evidence tends to show that he did, while circumstantial evidence tends to disprove that claim, a condition is presented involving such variety of circumstances as makes it proper to submit the question to the jury.”

See also *Jones v. East Tenn., V. & G. Ry.*, 128 U. S., 443.

While it is perfectly apparent to this court that the defendant in error had an opportunity to know the method of operation in said yards, still there was evidence in the record to show that sometimes there was a man on the cut of cars and sometimes there was a light, and there was some evidence indicating that this standing car was forced forward with unusual rapidity and force, although these facts were disputed, and we feel under the denial of knowledge on the part of defendant in error that the question of his knowledge and consequent assumption of risk was one for the jury to determine, unless such knowledge must be conclusively presumed as a matter of law from defendant in error's knowledge of the rules of the company, which will be hereinafter considered.

It is apparent that a finding to the effect that the defendant in error assumed the risk of an accident such as happened must of necessity be conditioned upon these conclusions to be drawn from the evidence: first, that his association with the tracks and their surroundings was such that in the exercise of ordinary care he should have known of the method of switching cars in said yard at night; and, second, that ordinary observation of the conditions by which he was surrounded would have disclosed to him the danger to be apprehended from such switching operations. After a careful consideration of the evidence,

we feel that with respect to these questions reasonable minds might reach different conclusions, and that therefore they were for the jury to determine.

We can not say that his relationship to the transactions in that yard were so close and intimate as to make a denial of knowledge on his part in effect a denial of a physical fact, which would warrant this court in substituting its judgment for the judgment of the jury.

But it is urged that notwithstanding his denial of knowledge, still his knowledge should be conclusively presumed as a matter of law because of the general rule of the company, which was known to him, and which required a man or a light on cars being pushed by an engine, but especially excepted from the rule cars being so moved in yards, the claim being that this exception was in effect a notice to him that a man or a light on such cars in yards was not only not required, but should not be expected.

Notwithstanding the case of *Swartwood v. Lehigh Valley Ry.*, 155 N. Y. Supp., 778, cited by plaintiff in error, which case sustains the claim above made, we can not subscribe to the proposition that as a matter of law, because said rules prescribed certain precautions to be taken in certain instances, they gave notice (by said exception) that the same precautions would not be taken in other instances.

Furthermore, we feel that there is good reason for saying that a rule that provides what shall be done "when cars are being pushed by an engine" does not necessarily apply to a situation where detached cars are moved under the momentum of a kick from an engine. There is a manifest difference between a detached car moving by the momentum of a kick and a moving car attached to an engine, for, in the latter instance, there is a means provided for stopping the car, while in the case of the detached car, unless there is a brakeman on the same, there is no means of stopping in case of probable or possible injury, and for this reason we might well expect that it would not be intended that a rule applicable to one situation would necessarily apply to the other. It seems to us that it could

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hardly be expected that a rule requiring attached cars being pushed to be guarded, but excepting cars being so moved in yards, would necessarily and as a matter of law be notice that kicked cars in yards would not be so guarded.

On this subject the court charged the jury as follows:

“The plaintiff must be charged with a knowledge of said rules, and so I say to you that, as a matter of law, the plaintiff, when he went into the Buffalo Junction yards of the defendant on the night of December 30th, 1916, assumed the risks growing out of the application of said rules, with their exceptions.”

Under this charge the jury must have found that said rules not being applicable to the situation at the time of the injury, the implication of notice claimed for them was not justified.

Under the circumstances, and for the reasons indicated, we decline to overrule that finding of the jury.

We are the more readily led to this conclusion by a consideration of the development of the law as to assumed risk. When the principle of assumed risk was first promulgated, a single master, as a general rule, had but few servants, and they worked practically under the eye of the master or his agent, under such conditions and with such authority that to all intents and purposes the agent was the master.

When that principle came to be applied to industrial conditions, where servants in large numbers served one master, and worked some of them widely separated from each other, and under the direction of agents of varying authority, and far removed from the master, the wisdom of the rule began to be doubted. Then the unequal distribution of the burden of industry brought about by the application of the rule to modern conditions created further doubts as to the wisdom of the rule. In time these consideration led to the adoption by legislatures of the policy of modification, and, in many states, to the abolishment of the doctrine of assumed risk and to the enforcement of the policy in reviewing courts of non-interference with the findings of juries on questions of fact upon which depend the application of that doctrine, where the facts or the inference to

be drawn therefrom are in dispute and have been fairly submitted to the jury.

This policy, whether wise or otherwise, has the sanction of the highest courts of the land. *McGovern v. Philadelphia & R. Ry.*, 235 U. S., 389 (59 L. Ed., 283; 35 Sup. Ct., 127); *Great Northern Ry. v. Mustell*, 222 Fed., 879; *Roach v. Great Northern Ry.*, 133 Minn., 257 (158 N. W., 232); *Lamb v. Pennsylvania Ry.* 259 Pa. St., 536 (103 Atl., 296); *Norton v. Maine Cent. Ry.*, 116 Me., 147 (100 Atl., 598); *Falyk v. Pennsylvania Ry.*, 256 Pa. St., 397 (100 Atl., 961); and *Indiana, I. & I. Ry. v. Bundy*, 152 Ind., 590 (53 N. E., 175).

Judgment affirmed.

GRANT and DUNLAP, JJ., concur.

ACTION AGAINST A DEFAULTING GUARDIAN.

Court of Appeals for Tuscarawas County.

THE STATE OF OHIO, ON APPLICATION OF GEORGE W. CLARK AND
BERTHA CLARK, VS. JAMES M. MCCLELLAND, GUARDIAN
OF GEORGE W. CLARK ET AL.*

Decided, February 12, 1919.

Sureties May be Hailed into Court by Wards—Without Determination Being First had of Amount of Guardian's Default, When—Application of the Ten Years Statute of Limitations.

1. Where a guardian has failed for a long period to file an account showing the condition of his trust, and his wards are without knowledge as to the amount of money which has passed through his hands, and a summons issued for him at their instance on a citation to file an account is returned "not found," application lies by the wards to the probate court for a citation against the sureties on the bond of the guardian as a preliminary step to enforce an accounting as to the amount of his default.

*Affirmed by the Supreme Court, *McClelland, Guardian, v. State ex rel*, January 27, 1920.

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2. The ten years statute of limitations on the bringing of suits on the bonds of guardians does not begin to run until the right of action accrues—that is from the filing of the final account, or an ascertainment as to the amount unaccounted for by the guardian.

H. I. N. Stafford and Welty & Burt, for plaintiff in error.
W. V. Wright, contra.

SHIELDS, J.

It appears by the record herein that on March 16, 1893, the defendant in error, James McClelland, was duly appointed guardian of the persons and estates of the relators, George W. Clark and Bertha Clark, minors, by the probate court of Tuscarawas county, Ohio; that a bond in the sum of \$150 was then given by the said McClelland as such guardian with the defendants in error. David Whitmire and Henry Centavin as sureties thereon, and that an additional bond in the sum of \$500 was given by him as such guardian in the year 1895, by order of said probate court, with the defendants in error, Herbert A. Wright and Lyman Hardman as sureties thereon; that at the time of said appointment the said George W. Clark was ten years of age, October 3, 1893, and the said Bertha Clark was seven years of age, May 5, 1893, both of whom were then entitled to receive a pension from the United States Government, and which fact was entered of record in said probate court at the time of said appointment; that no account has been filed by the said McClelland as such guardian from the time of his said appointment; that on January 2, 1918, a citation was issued by said probate court to the said McClelland as such guardian to file an account of his guardianship in said court upon a date therein named, and a summons was thereupon issued upon said citation for him directed to the sheriff of Cuyahoga county, Ohio, which was returned indorsed "not found"; that afterward and on February 8, 1918, an application for a writ of citation to issue against the said Herbert A. Wright and Lyman Hardman, sureties as aforesaid, was filed in said probate court to file an account in the matter of said guardianship, when the said Hardman filed an answer to said application setting up, among other things, the following:

“This defendant further says that the older of said wards, Bertha Clark, became of full age on the 5th day of May, 1899, and that the younger of said wards, George W. Clark, became of full age on the 3rd day of October, 1904, and that as the time for filing the said application for a writ of citation did not accrue within ten years next preceding the date of filing the same, the said application is therefore barred by the lapse of time and the statute of limitations in such case made and provided.”

And that upon a hearing had upon said application to issue said writ of citation said probate court held:

“That the said application and motion on the part of relators to procure an accounting at this late date is barred by lapse of time and the statute of limitations in such case made and provided, and it is further ordered and decreed that the several applications and motions heretofore filed in this court by the said relators requiring and demanding an accounting of said guardianship be and the same are hereby dismissed at the cost of said relators.”

Error was prosecuted to the common pleas court of said county from said judgment, which said court affirmed said judgment of the probate court, not, however, upon the ground that said relators were barred by the statute of limitations, but because said application was open to the objections that it did not definitely state the amount then due and owing to said relators by said guardian so that said probate court, if it found it necessary to render a judgment, might do so for the amount appearing due in the application made. A petition in error was thereupon filed in this court to reverse said judgment.

The facts in the case are not disputed. If the action here was an action to compel the sureties on a guardian's bond to account for a default made in the payment of trust funds by a guardian, the law is well settled that before such action could be maintained there must be a finding and adjudication by the probate court of the amount due on final account to be filed by the guardian. *Newton v. Hammond*, 38 O. S., 430.

But the view we take of the question made by the record before us does not involve the preliminary steps necessary to

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be taken for suit against the sureties on this bond, but relates solely to the legal right of the relators to file an application for a writ of citation to issue against the sureties on said bond to account for the default of said guardian. Failing to get service of process on the guardian, resort was had to proceedings instituted against the sureties, and it was upon the commencement of such proceedings, namely, the application filed for a citation to issue against the sureties that the right of the relators is challenged—challenged by an answer filed by one of the bondsmen wherein he pleads the statute of limitations as a bar against the right of the relators to have such writ issued.

As already indicated, the probate and common pleas courts appear to have entertained widely divergent views of this case, the former holding that the statute of limitations operates as a bar, the latter holding that it does not, but rests its affirmance of the judgment by the former on other grounds. Under the general powers incident to the jurisdiction conferred on probate courts in the matter of guardian accounts and the duty enjoined upon such courts by law to guard and protect the interests of minors, we do not incline to the opinion that a case where such interests are endangered by a long continued violation of duty on the part of the guardian that such courts are not authorized to act upon an application filed for a writ of citation to issue for such guardian to account, unless said application shows the amount appearing to be due from said guardian under said trust. We think that the application is but a preliminary step to enforce such accounting and that a statement of the fact that the guardian is or has been delinquent of duty is sufficient. As was said by Judge McIlvaine in announcing the opinion of the court in the case already cited when discussing the powers of probate courts and the duties of guardians,

“all these considerations show the wisdom and propriety of the rule which requires the settlement of guardians’ accounts by the probate court, which, for that purpose, possesses all the powers of a court of equity, instead of a jury, which does not possess such facilities.”

Here it appears that the guardian never filed any account since his appointment and it was not known to the relators, nor had they any means of knowing at the time said application was filed of the amount of pension money collected by him for his said wards. In the application made for the appointment as such guardian by said McClelland, who made oath to the same, the statement therein shows that the property of said wards "consisted of an interest in a pension claim, the value of which is indeterminate." Hence in view of what the record shows they were not then advised of the status of said guardian of said trust in respect to the amount of pension moneys collected by him and with which he was chargeable as such guardian.

We think that said probate court was also in error in dismissing said application. Section 11226, G. C., provides that,

"An action on an official bond, or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued."

In the case of *Newton v. Hammond*, already cited, it was held that,

"A right of action on a guardian's bond to recover from the sureties the amount remaining in the hands of the guardian, first accrues to the ward when such amount is ascertained by the probate court on the settlement of the guardian's final account."

And in the opinion of the court in said case it was said "that an accounting must precede judgment is clear from the fact that the amount of the judgment can not otherwise be ascertained." The reason for this statement requires no elucidation for it is evident that until a finding is made by the court of the amount due under his final account filed, there can be no way of ascertaining the liability of his sureties. It is then that the right of action first accrues. But the sureties make reply and say that the statute provides that unless suit is brought within ten years, etc., they are discharged from liability. But the same statute likewise adds "after the cause

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thereof accrued." It is not difficult to understand that there may be cases where the neglect of duty by a guardian may entail liability upon sureties, but it must be remembered that such risk is incurred by the relation they voluntarily see fit to assume. And in this case it may be said that if these sureties had cause to apprehend loss through the neglect or failure of a guardian to perform duty, the law afforded them an opportunity to protect themselves. They are not permitted to sign a bond and thereby say to the court and those interested in an estate that they will be answerable for the conduct of a guardian who later on may be found to be derelict of duty, and then escape liability on their bond, unless it is made to appear that they are clearly entitled to the benefit of the statute referred to. Probate courts were established to protect the estates of orphans. It is in a certain sense a trustee designated by the law to look after and protect the interests of the living and dead, and in a rigid and faithful execution of the duties of said office by the incumbent thereof is the only hope of a trusting public. Under the law the probate judge is the person who appoints the person or persons to administer estates; he is the person who fixes the amount and passes upon the sufficiency of bonds to be given for the faithful performance of the trust; and he is the person whom the law designates as the person to see to it that all duties devolving upon guardians under the law are faithfully carried out, either with or without complaint first made. Section 10939 provides,

"The court by which a guardian is appointed, shall enforce the return, at the prescribed times of all inventories and accounts required to be filed therein by him, and enforce the performance of all other duties devolving upon guardians appointed by it, either with or without complaint first made; and thereupon make and enter such judgments and orders as are requisite in any case to promote the faithful and correct discharge of such duties, or to preserve the estates of minors for whom guardians were appointed."

"With or without complaint first made." Charged by the law with the supervision of estates as he is, and "to preserve the

estates of minors for whom guardians were appointed," it would seem that a duty rests upon the probate judge in cases like the one under consideration, and if such view is correct, ought minors of tender years pay the penalty of such failure of duty in later years? The above statute is cited simply to illustrate the solicitude shown by the law and the care required by it in the administration of estates of minors. The statute is both a humane and just one, and when such estates are taken over and given into the charge and control of others, the latter should be held to a strict account in performing a "faithful and correct" discharge of duty, and the sureties of such person or persons pledging, as they do, their property for such discharge of duty, should be held to the letter of their suretyship contract.

Counsel for defendants in error argued and cited in his brief cases wherein it is held that the limitation of suit on an administrator's bond is fixed at ten years from the time action accrues, which under the application of the rule laid down by the Supreme Court in this state, as we interpret it, is ten years *after a final account is filed* when the statute of limitations begins to run, and not till then. While it is unnecessary to here state that the statutes in all jurisdictions pertaining to the administration of estates, including the limitation of time in which suits may be had on bonds of administrators and guardians are not the same, and while the statutes of this state have undergone change in this respect by amendment from time to time and the powers of probate courts enlarged, we are of the opinion that the proceeding instituted in the probate court to compel an accounting by these sureties was a proper exercise of the powers incident to the jurisdiction conferred by law on probate courts, and that said court erred in dismissing said proceeding for the reasons hereinbefore stated.

The judgment of the court of common pleas in affirming the judgment of the probate court will be reversed and said cause will be remanded to said probate court for further proceedings.

HOUCK and PATTERSON, JJ., concur.

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Cuyahoga County.

VALIDITY OF AN EXCESSIVE VERDICT PURGED BY REMITTITUR.

Court of Appeals for Cuyahoga County.

CLEVELAND RY. V. BURIANEK.

Decided, July 7, 1919.

Verdict—Adverse Party Can Not Complain—Because of Elimination of Excess by Remittitur, When—Presumption as to Regularity of the Action of the Trial Court.

1. Where a verdict is not a matter of computation but of opinion, if such verdict is excessive and appears to have been given under the influence of passion or prejudice, a new trial should be granted; but where such verdict, though excessive, is not a result of passion or prejudice, the party against whom the verdict is rendered can not be heard to complain if the trial court, with the consent of the party in whose favor the verdict is rendered, reduces the amount of the verdict and renders judgment for a less amount.
2. Where the plaintiff's right to recover is fully and clearly established and the trial court expressly finds that an excessive verdict was not the result of passion or prejudice, and it appears that such verdict was purged of its excessive character by a remittitur in the trial court, and there is no evidence from which such unworthy influence might be reasonably inferred, except the amount of the verdict, a reviewing court will indulge every presumption in favor of the finding of the trial court and will not reverse such finding, unless the verdict was so large and disproportionate to the injuries as to shock all sense of proportion.

Error.

Squire, Sanders & Dempsey, for plaintiff in error.

Payer, Winch, Minshall & Karsh, for defendant in error.

WASHBURN, J.

Defendant in error, Charles Burianek, sued the plaintiff in

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 27, 1919.

error, The Cleveland Railway Company, for injuries suffered by him while a passenger upon one of the cars of the company, which was derailed and came into collision with another car under circumstances which fully warranted the jury in finding that the company was liable for whatever injuries were received by said Burianek in said derailment and collision.

The verdict was for \$27,000.

The trial court found the verdict to be excessive, but expressly found that the jury was not influenced by passion or prejudice, and, upon a remittitur being entered by Burianek in the sum of \$12,000, the motion for new trial filed by the company was overruled and a judgment rendered for the sum of \$15,000.

It is urged that the trial court should have granted a new trial, and committed error in not doing so. This is the chief error relied upon, and we do not deem it necessary to say anything in reference to the other alleged errors complained of, except that we find that the case was fairly submitted to the jury, that the charge considered as a whole was free from error, and that the facts fully justified a finding of liability on the part of the company.

In cases of this kind where the verdict is not a matter of computation, but of opinion, we take it to be settled in this state that if the verdict was materially excessive, and appeared to have been given under the influence of passion or prejudice, the trial court was without power to substitute its opinion for that of the jury, and enter judgment thereon, and in that event it should have granted the motion of the company for a new trial.

Under our statute the presence and influence of passion or prejudice, in producing an excessive verdict, vitiates the verdict as a whole, and the court can not validate or save any part of it against the objection of either party.

If, however, the verdict, though excessive, was not the result of passion or prejudice, the party against whom the verdict was rendered can not complain if the trial court, with the consent of the party in whose favor the verdict was ren-

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dered, reduces the amount of the verdict and renders a judgment for a less amount.

Indeed, in such a case, where no passion or prejudice appears, but where in the opinion of the trial court the verdict is materially excessive, the court, in the exercise of a sound discretion, may make a remittitur of the excess a condition for refusing a new trial. *Pendleton Street Ry. v. Rahmann*, 22 Ohio St., 446. See also *Brenzinger v. American Ex. Bank*, 19 C. C., 536, 540, and *Carl v. Pierce*, 20 C. C., 68.

This right of the trial court to make a remittitur a condition for refusing a new trial, which is established by *Street Ry. v. Rahmann*, *supra*, was recently approved by the supreme court in *Ohio Traction Co. v. Shearer*, 97 Ohio St., 332 (120 N. E., 878), the record and briefs of which we have examined, in which case the court exercised such discretion, and the supreme court affirmed the judgment on authority of *Street Ry. v. Rahmann*, *supra*.

This rule which we regard as established by authority is supported by principle; the trial judge is not a mere umpire; he is charged with the duty of seeing that justice is administered, and he should not be required to render judgment for an amount which is plainly and materially excessive merely because he does not find that the verdict was inspired by the unworthy motives of passion or prejudice. He is called upon to exercise a sound discretion, but his granting a new trial is not a final determination of the rights of the parties; he renders no judgment, but finding that the trial has plainly resulted in a palpable miscarriage of justice, he orders that another trial be had. There was a time when the defeated party was given a second trial as a matter of right, but now, except for those causes for which the trial court is required by statute to grant a new trial the matter is governed by the sound discretion of the trial judge, and his action in granting a new trial is not reviewable by the higher courts. *Conord v. Runnels*, 23 Ohio St., 601, and *Smith v. Bucyrus* (Bd. of Ed.), 27 Ohio St., 44. See also *Brenzinger v. American Ex. Bank*, 66 Ohio St., 242 (64 N. E., 118).

The statutes set forth certain causes for which the trial judge *must* grant a new trial, and if a statutory ground for a new trial exists and the trial judge fails to grant a new trial his action may be reviewed and his error corrected by the higher courts: if an excessive verdict is caused by passion or prejudice, he *must* grant a new trial; but if no passion or prejudice exists, but the verdict is plainly, unmistakably and materially excessive, he *may* grant a new trial if the prevailing party refuses to make a proper remittitur. This does not mean that a trial judge should act arbitrarily: he should recognize, of course, that individual opinions are eccentric and uncertain; that the money value of personal wrongs can have no exact standard of measurement; and that when measured by the opinion of a jury public policy demands that such verdict be not disturbed unless it is plainly and unmistakably excessive or some statutory ground for a new trial exists.

This discretionary power vested in the trial judge, not to substitute his opinion for that of a jury and render final judgment, but merely preserving all of the rights of the parties to require them to retrace their steps in the same court, is recognized as an inherent power vested in him because of his knowledge, experience, and training, and his intimate familiarity with every phase of the trial, he having the opportunity of seeing the injured party and the witnesses and hearing them testify and being in the best possible position to form an opinion in the light of his experience and knowledge, which includes a knowledge of the opinions of other jurors in similar cases.

After the trial judge has exercised this discretion and refused a new trial and entered judgment, the power of the reviewing court over that judgment, cases of this character, is controlled by the *Constitution*. The reviewing court not having the opportunity of seeing the parties and witnesses and hearing them testify, and of knowing all the incidents of the trial known to the trial judge, but which can not be spread upon the record and exhibited to the reviewing court, in order to reverse the trial court on the ground that the verdict was excessive must find that the verdict was not only excessive but that it appears

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to have been given under the influence of passion or prejudice. We can not reverse merely because the verdict is, or before remittitur was, excessive, nor does the excessiveness of the verdict, in this class of cases, authorize this court to modify the judgment or make a remittitur a condition of an affirmance of the judgment. In a recent case, *Toledo Rys. & Light Co. v. Paulin*, 93 Ohio St., 396 (113 N. E., 269), our supreme court, having in mind that this is a reviewing court, which acts upon a printed record without the opportunity of the trial court and jury to see the witnesses and hear them testify, and not in a position to judge of their credibility, held that we could not substitute our judgment for that of the jury. The law on the subject is stated in that case, at page 400, as follows:

“If the court of appeals from an examination of the printed record may weigh the evidence, which involves also the determination of the credibility of the various witnesses, and therefrom reach a conclusion as to the nature and extent of the injuries suffered by plaintiff and fix the amount of money which, in its opinion, will reasonably compensate him for his loss, the court will have usurped the functions of the jury. Time and money will have been uselessly expended in trying the case to the jury if these controlling questions of fact are not to be there settled but are to be considered and determined by the *reviewing* court.

“Under the provisions of the constitution cited in the entry of the court of appeals a judgment can not be reversed upon the weight of the evidence except by the concurrence of all the judges, and in that event the case must be remanded for a new trial. Though all the judges concur in a finding that a verdict is against the weight of the evidence, the reviewing court is not authorized to render final judgment, nor is it authorized, from a consideration of the weight of the evidence, to enter a judgment different in amount from the judgment reviewed.

“If the verdict is found to be excessive, appearing to have been induced by passion or prejudice, it is the duty of the reviewing court to reverse and remand for a new trial. The province of the jury is invaded if, instead of so doing, the judges of the reviewing court substitute their own verdict for the verdict of the jury. Surely there is manifested in the constitu-

tional provision above cited no purpose to confer any power upon the reviewing court that would lead to such a result.”

It does not necessarily follow, however, where a remittitur is *voluntarily* entered in this court, that we may not modify the judgment accordingly, and affirm the judgment as so modified, in case we do not find that the verdict was the result of passion or prejudice.

In the case at bar the trial court expressly found that the verdict was not influenced by passion or prejudice, and therefore the sole question for us to determine is whether or not the court erred in so finding. If the court did err in so finding, then the case must be reversed. The record does not disclose anything occurring at the trial which indicated or was calculated to excite passion or prejudice, but the claim is made that passion or prejudice is inferable from the magnitude of the verdict alone, because upon a consideration of all the facts and circumstances the verdict of \$27,000 can be accounted for rationally only as having been returned under the obnoxious motives mentioned.

That the plaintiff below was seriously injured was not controverted by the evidence. Although he was examined by physicians for the company, said company offered no testimony whatever on the subject of injuries or damages, and this, together with the fact that the record discloses that there was an unfriendly feeling between some of the physicians who testified for the plaintiff, justifies the inference that the plaintiff probably did not exaggerate his injuries or consequent damages.

Where the plaintiff's right to recover is fully and clearly established and the trial court expressly finds that an excessive verdict was not the result of passion or prejudice, and it appears that such verdict was purged of its excessive character by a remittitur in the trial court, and there is no evidence from which such unworthy influence might be reasonably inferred, except the amount of the verdict, a reviewing court will indulge every reasonable presumption in favor of the finding of the trial court and will not reverse such finding unless the verdict was

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so large and disproportionate to the injuries as to shock all sense of proportion and necessarily show the existence of such invalidating influence. *Pittsburg, C. C. & St. L. Ry. v. Sheets*, 34 O. C. C., 642 (15 N. S., 305), and *Spear & Co. v. Fulton*, 3 Ohio App., 40; 40 O. C. C., 635 (21 N. S., 557). See also *Douglas v. Day*, 28 Ohio St., 175.

From a consideration of the whole record, we find that while the verdict was large it was not so disproportionate to the injuries as to necessarily imply that it was the result of passion or prejudice, and we therefore find that it was not error for the trial judge to overrule the motion for a new trial, and that there was no abuse of discretion in the exercise of the power of the trial court which resulted in a reduction of the amount of the verdict.

Judgment affirmed.

DUNLAP and VICKERY, JJ., concur.

**NECESSARY DECLARATION BY COUNCIL IN ORDERING A
PUBLIC IMPROVEMENT.**

Court of Appeals for Warren County.

ROBERT A. McCUTCHEON VS. THE VILLAGE OF FRANKLIN,
OHIO, ET AL.

Decided, May 25, 1917.

*Construction of Section 3812 as Amended—Approval of Specifications,
Plans and Estimates—Discretion in Letting Contracts—Alternative
Bids on Different Materials—Authority of Council, in Fixing Amount
of Bonds to be Issued for an Improvement, to Limit Other Expen-
ditures.*

The requirement found in amended Section 3812 that, in authorizing an improvement, council shall find and declare not only the necessity therefor but also that it will conduce to the public health, convenience or welfare, has reference to the improvement of ditches, etc., as specified in the amendment, and not to the numerous street, alley, sidewalk, curb and other improvements provided for in the section as it stood in its original form.

Gaynor & Harding, for plaintiff.

Arthur Bryant and Ben Harwitz, contra.

JONES, P. J.

Plaintiff seeks an injunction, as a taxpayer, against the village of Franklin and its mayor and clerk from entering into a contract for the improvement of certain parts of Park avenue, Center, Front and Second streets in said village, from proceeding with said improvements, or issuing bonds to pay for any part of the cost thereof.

The case was heard on appeal in this court. A number of reasons are urged why the proceedings of the village and the letting of the contract for said improvements are irregular and contrary to law:

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1. It is first contended that Section 3812, G. C., as amended April, 1910 (101 O. L., 134), requires a finding and declaration by council not only of the necessity of such improvement, which is required under Section 3814, G. C., but also that such improvements are conducive to the public health, convenience or welfare; otherwise, that no assessment can be levied for the cost of said improvement.

The language that was inserted in Section 3812 by the amendment of April 10, 1910, above referred to is relied upon for this contention. The new language inserted by that amendment in Section 3812 is as follows:

“and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or watercourse, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall or riprap protection, bulkheads, culverts, approaches, flood gates or waterways or drains incidental thereto, which the council may declare conducive to the public health, convenience or welfare” * * *.

It will be observed by an examination of Section 6443, G. C., relating to county ditches, and Section 6612, G. C., relating to township ditches, that the purpose of this amendment was to permit the improvement of water courses, ditches and drains and the appurtenances thereto in a manner similar to county and township ditch improvements, and that the declaration that such improvements were conducive to public health, convenience or welfare has always been embraced as an essential in the ditch law; and in the opinion of the court the intention of the Legislature in this amendment to Section 3812, G. C., was to require the declaration that such improvement would be conducive to the public health, convenience or welfare, to apply only to such improvements as are included in the new language imported into the section by this amendment, and not in any way to apply to the numerous improvements provided for in that part of the section as it existed before the amendment.

2. It is contended that no plans, specifications, estimates and profiles for the proposed improvement were prepared or approved by council at the time of the passage of the resolution declaring it necessary to improve said streets. The recital embraced in section 3 of the improvement resolution, a copy of which was offered in evidence, is in itself sufficient to refute this claim. Said resolution to improve was passed April 17, 1916, and bears the signature of both the mayor and the clerk. Section 3 thereof is as follows:

“That the plans, specifications, estimates and profiles of the proposed improvements heretofore prepared by the engineer of said village and now on file in the office of the clerk thereof, be, and the same are, hereby approved.”

There was, however, considerable testimony offered on the subject of the approval of the specifications. The original specifications as prepared by the engineer are in evidence. The mayor testified that he saw no copy of the specifications as approved until bids were submitted by the bidder. The clerk testified that plans and specifications for these improvements were not on file on April 17; but he admitted in his testimony that he never marked specifications with the date of filing or approval as his duties as village clerk would require; and he further admitted that he gave to the village attorney the original specifications two or three days after the council meeting, for the purpose of permitting exact copies to be made by the attorney and the engineer for the use of bidders; and he fails to explain where he got these original specifications unless they were left with him at the council meeting. On the other hand, the engineer testified that the original specifications, plans, profiles and estimates were prepared by him and were brought to the council meeting and submitted to council—being laid upon the table in front of the clerk on the evening of April 17, prior to the reading and passage of the resolution declaring the necessity of said improvements. His testimony is supported by that of four members of council and also by that of the vil-

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lage attorney. The further fact appeared from the testimony of one member of council as well as that of the attorney, that the resolution declaring the necessity of the improvement had been prepared by the attorney and was ready for introduction at a previous meeting of council, about two weeks before that of April 17, and that it was not then introduced for the reason that the attorney advised council that the law required that the specifications should be prepared and approved before the passage of the resolution. This requirement is found in Section 3815, G. C. The resolution declaring the necessity of the improvement as provided by Section 3814, G. C., has been held to be a condition precedent to the levy of a valid assessment for a street improvement. *Wilkin v. Porter*, 18 O. S., 85; *Stephan v. Daniel*, 27 O. S., 527, 531.

The original specifications are prepared upon printed blank forms, with some pen and ink changes and some typewritten changes, sections written out and pasted over printed sections, and some blanks are filled in with lead pencil. Their condition is far from complimentary to the engineer who prepared them. The copies which were prepared for the use of bidders are not in all respects the exact copies of the original; but under the terms of the bid, the original specifications would bind where any discrepancies appear. The only important discrepancy noticed, between the form used by the successful bidder and the original adopted by council, is in relation to the proportion of gravel required in the concrete. This in the original is six parts, while in the copy bid upon it is seven parts. However, as before stated, in case of any discrepancy the original specifications control.

The village has no municipal office open other than at council meetings, and has limited facilities for carrying on the necessary clerical work connected with its matters, but the proceedings in regard to this letting seem to have been had with a carelessness considering the cost of the improvements and the importance of the work, that subjects the public officials to merited criticism. However, the court finds, upon a consideration

of the evidence, that the specifications, plans, profile and estimates were duly approved by council as part of and concurrent with the adoption of the resolution declaring the necessity to improve these streets.

3. It is further contended that the specifications and advertisement did not specify any particular kind of brick to be used in the pavement of these streets, but that bids were taken upon several kinds, and the particular brick to be used was selected at the time of the award of the contract.

We find no inhibition in the law against this mode of procedure. On the contrary, it has been upheld in the cases of *Scott v. Hamilton*, 7 C. C. (N. S.), 496, and *Tucker v. Newark*, 19 C. C. 1; and our own court has sustained alternative bids on different materials and methods of construction in the awarding of the contract for the building of the Hamilton county court house, in *State, ex rel, v. Green*, 22 C. C. (N. S.), 1.

4. Another objection is that the contract was not let to the lowest bidder.

The statute under which the letting was made, Sections 3833 and 4328, authorizes the letting "to the lowest and best bidder." The evidence shows that Bigler Bros., to whom the award was made, were not the lowest bidders. But it has frequently been held that in the absence of allegations of fraud and collusion—which are not charged in plaintiff's petition—courts will not interfere with the exercise of discretion by public officers in determining who is the lowest and best bidder. This rule is so well settled in Ohio that it is hardly necessary to cite cases. *State, ex rel, v. Bd. Pub. Service*, 81 O. S., 218, 225; *State, ex rel, v. Commissioners*, 63 O. S., 440; *Scott v. Hamilton*, 7 C. C. (N. S.), 493; *Yaryan v. Toledo*, 8 C. C. (N. S.), 1; *Coppin v. Herman*, 6 N. P., 452 (Aff'd 63 O. S., 572).

5. Another objection, and the last which is necessary to notice, is that the making of these improvements would require bond issues by the village of Franklin in excess of the amount authorized by law.

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A careful consideration of the evidence shows that there is no question but that authority lies in the council, if it so desires, to issue the necessary bonds without exceeding the limitation fixed by law, even though it may become necessary to reduce some other expenses, although that necessity is not apparent from the evidence before us.

The finding of the court is therefore in favor of the defendant, and plaintiff's petition is dismissed at his costs.

GORMAN and HAMILTON, JJ., concur.

**EFFECT OF FAILURE TO FILE MOTION FOR A NEW TRIAL IN
TIME IN PERSONAL INJURY CASE.**

Court of Appeals for Cuyahoga County.

Kinkade, Richards and Chittenden, JJ., of the Sixth District, sitting by designation.

CHAPEK V. CITY OF LAKEWOOD.

Decided, April 19, 1919.

*Motion for a New Trial—Where Not Filed Within Statutory Time—
Court of Appeals Without Jurisdiction to Consider Weight of the
Evidence in Personal Injury Case.*

The court of appeals has no power in an error proceeding to consider the weight of the evidence on a judgment rendered on a directed verdict for the defendant in a personal injury case, where no motion for a new trial was filed within the statutory time, even though the defendant offered no evidence and the only evidence showing the circumstances of the plaintiff's injury was his own testimony.

P. J. Mulligan and J. P. Kalina, for plaintiff in error.

R. G. Curren, contra.

RICHARDS, J.

Heard on error.

This action was commenced for the purpose of recovering damages for personal injuries, the plaintiff claiming that the city negligently left across a street an open trench into which he drove with a horse and delivery wagon. At the close of the plaintiff's evidence the trial court directed the jury to return a verdict for the defendant on the ground that the evidence showed that the plaintiff was guilty of negligence directly contributing to his own injury. This verdict was returned on Friday, January 19, 1919. A motion for a new trial was filed, but not until the following Tuesday, which would not be within the time required by statute.

It is, however, insisted by counsel for plaintiff that no motion for a new trial was necessary. This argument is based on the contention that no evidence was offered on behalf of the plaintiff showing the circumstances of his injury, except his own testimony, and, the defendant not having offered any evidence, that which was offered by the plaintiff amounted to the conceded facts of the case and it only remained for the trial court to apply the law to those facts.

It was said in the case of *Weaver v. Columbus, S. & H. V. Ry.*, 55 Ohio St., 491, 494, that the statutes do not expressly prescribe the conditions under which a motion for new trial is necessary and that the question depends upon a judicial interpretation and construction of various statutory provisions. These provisions are contained in Secs. 11564, 11576, 11578 and 11579, G. C.

In a case entitled "*In the Matter of the Estate of Hinton, Deceased*," 64 Ohio St., 485, there was an agreed statement of facts, and the court say that all that was necessary was for the court to apply the law to the conceded facts, and that as there was no evidence to be weighed or considered, the only question being whether the court rendered the right judgment upon the agreed facts, a motion for a new trial was not necessary. Other similar illustrations may be found in the reports. We can not,

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however, apply the rule thus announced to the situation disclosed in the present case. An agreed statement of facts contains or should contain the facts rather than the evidence, while in the case at bar we do not have the agreed facts, but merely the testimony of the plaintiff, which must be weighed and considered in order to determine what the ultimate facts are, and in such a case a motion for new trial is necessary.

The injury to the plaintiff occurred in the daytime, and his testimony tends to show that he had full knowledge of the existence of the trench, partly filled with earth, and that there was some snow and slush in the trench, but that he did not know that the earth under the slush was soft. His horse stepped into this opening, and, sinking down, became frightened, thus causing the injury. The court would be required to determine from the plaintiff's testimony whether under the circumstances disclosed he would or would not have an equal opportunity with the city to know the precise condition of the trench at the time of the injury and whether he was guilty of contributory negligence. This all involves a weighing and consideration of the testimony, which is entirely different from applying the law to conceded or agreed facts.

It is said in 1 Jones' Commentaries on Evidence (1913 ed.), Section 10a, that it is a strange thing that "fact" and "evidence" have sometimes been used synonymously; and in the same section we find the following language clearly showing the difference between "fact" and "evidence":

"We ascertain the existence of a fact by means of evidence. The evidence, and each item thereof, are, in a certain sense, facts. But the different items of the evidence are not necessarily such facts as call in operation the law. It is the proof—the facts resulting from the evidence—that invoke the law. It is the chief purpose of a judicial inquiry to ascertain the probative or ultimate facts. The application of the law to them follows as a necessary incident."

The issues in this case involve negligence and contributory negligence and evidence was introduced by the plaintiff which

bears on both issues, but he contends it did not justify the court in directing a verdict.

The question as to when a motion for a new trial is necessary is quite fully discussed in Kinkead's Ohio Civil Procedure, Secs. 848, 849 and 850.

We are of opinion that a motion for a new trial was necessary in this case, and none having been filed within the statutory limit we are unable to consider the evidence set forth in the bill of exceptions.

Judgment affirmed.

KINKADE, J., I concur only in the judgment of affirmance.

CHITTENDEN, J., concurs.

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PROVISION FOR A WIFE DIVORCED FOR HER OWN AGGRESSION.

Court of Appeals for Hamilton County.

ROBERT C. HEFLEBOWER V. HELGA V. B. HEFLEBOWER.

Decided, February 24, 1920.

Divorce and Alimony—Decree Making a Division of the Husband's Property—Distinguished from an Allowance of Alimony—Allowance of a Monthly Sum for an Indefinite Time—Where Neither Fixed or Ascertainable is not a Share of the Husband's Estate.

1. In an action for divorce and alimony the power of the court to make provision in favor of a wife, against whom a divorce has been ordered for her aggression, is fixed by Section 11993 of the General Code. It is authorized to order the transfer to her of a share of real or personal property, owned by the husband at the time of the decree, but it may not order alimony based on future personal earnings.
2. Whether a decree entered constitutes an order for the payment of alimony or a share of the husband's estate, is to be determined by the legal effect of the judgment entry as a whole.
3. An order for alimony can be modified upon a change of circumstances and conditions and differs from an order adjudging a share of the husband's real or personal property, which is a final determination of the rights of the parties.
4. Where the court makes an order for the payment of a monthly sum for an indefinite time, not out of property then owned by the husband, the total amount of which is neither fixed nor ascertainable, the award is not a "share of the husband's real or personal property."
5. If a court makes a decree which is not within the powers granted to it by the law of its organization, the decree is void and it may be attacked collaterally in proceedings in contempt to enforce it.

Closs & Luebbert and Dempsey & Nieberding, for plaintiff in error.

Peck, Shaffer & Williams, contra.

Heard on error.

SHOHL, P. J.

This is a proceeding in error to the judgment of the court of insolvency finding plaintiff in error guilty of contempt of court because of disobedience of an order directing him to pay \$35 per month to defendant in error, against whom he had been granted a divorce.

In January, 1910, the plaintiff in error brought an action against the defendant in error, praying for a divorce and for general relief. Defendant filed a cross-petition praying for alimony. In September, 1910, the court entered a decree in favor of the plaintiff finding the defendant guilty of wilful absence and dissolving the marriage relation between the parties. The court reserved all questions of alimony and support of children and attorneys' fees for further hearing. After the further hearing, the court entered the following:

"This cause coming on further to be heard upon the matter of alimony allowance to the defendant and upon the evidence, the court find that the defendant is entitled to alimony, and it is ordered, adjudged and decreed that the plaintiff pay to the defendant the sum of \$35 per month upon the first day of each and every month, and the further sum of \$100, to be paid to the counsel for said defendant as an allowance of counsel fees herein.

"And it is further ordered that the custody and support of the children be committed to the defendant until further order of the court, and that the support of said children, during their minority, be borne by the defendant."

In September, 1918, the defendant filed charges of contempt against plaintiff for failing to pay the sums ordered. The plaintiff answered alleging that the plaintiff had been granted a divorce against the defendant by reason of her aggressions; that the plaintiff at the time of the decree had no property or estate of any kind, except his ability to earn money in his profession, and that there was no order, decree or judgment awarding to the defendant any property or estate belonging to the plaintiff; that the court was without power or authority to enter a decree for weekly alimony and for other reasons. All of the

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pleadings and orders of the court in the divorce case were placed in evidence.

It is admitted that after January 1st, 1917, plaintiff has made no payments under the order of court.

The case raises several questions.

First. May a court grant to a wife, against whom a divorce has been ordered for her aggression, alimony payable periodically for an indefinite time, and is this an order for the payment of a share of the husband's real or personal property?

Second. Does it appear from the record that the trial court did so decide?

Third. If the court did so decide, and if such decision is incorrect, can it be questioned in an action for contempt?

Jurisdiction in matters of divorce and alimony is purely statutory. *Marleau v. Marleau*, 95 O. S., 152.

General Code, Sections 11990 and 11991 fix the rights of a wife to whom a divorce is granted because of the husband's aggression. The rights of a wife against whom a divorce is granted by reason of aggression are fixed by Section 11993. These sections are as follows:

Section 11990. "When a divorce is granted because of the husband's aggression, by force of the judgment the wife shall be restored to all her lands, tenements and hereditaments, not previously disposed of, and the husband barred of all right of dower therein. If she so desires the court shall restore to her any name she had before such marriage, and allow such alimony out of her husband's property as it deems reasonable, having due regard to property which came to him by marriage and the value of his real and personal estate at the time of the divorce."

Section 11991. "Such alimony may be allowed in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court deems equitable. If the wife survives her husband, she also shall be entitled to her right of dower in his real estate not allowed to her as alimony, of which he was seized during the coverture, and in which she had not relinquished her right of dower."

Section 11993. "When the divorce is granted by reason of the aggression of the wife, she shall be barred from all right of dower in the lands of which her husband is seized at the time

of filing the petition for divorce, or which he thereafter acquires, whether there is issue or not. The judgment of divorce shall restore to her the whole of her lands, tenements or hereditaments not previously disposed of and not allowed to her husband as alimony, subject to the dower right of her husband therein. The court may adjudge to her such share of the husband's real or personal property, or both, as it deems just; * * *."

Unless the wife, who is adjudged to be in the wrong, acquires her rights under Section 11993, there is no foundation for a provision in her favor. It is necessary, therefore, to examine the language of that section. The statement "the court may adjudge to her such share of the husband's real or personal property as it deems just," seems plain. Its power to make an award in her favor is to order the transfer to her of a share of certain existing property.

It is urged on behalf of the defendant in error that the Supreme Court in the case of *Lape v. Lape*, 99 O. S., —, in construing Section 11990 held that jurisdiction to grant alimony "out of her husband's property" permitted the allowance of alimony based on future earnings or wages of the husband. The decision in that case holds that as the court has power to order "alimony" the phrase "out of her husband's property" is not of controlling force. In determining what the legislature meant by "alimony," the court reiterates the statement in *Fickel et al v. Granger*, 83 O. S., 101, that it is founded on the obligation which grows out of the marriage relation that the husband must support his wife, which obligation continues after legal separation, without her fault. The decision as a whole is an application of the doctrine stated by Judge Thurman in the case of *Tracy v. Admr. of Card*, 2 O. S., 431, and referred to in the *Lape* opinion, that "it is by no means unusual in construing remedial statutes to extend the enacting words beyond their natural import and effect in order to include cases within the same mischiefs." The construction there given was required to prevent injustice to a wife who had been wronged. Those considerations can not fairly be said to be applicable to a case where the marital relation is terminated by reason of the mis-

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conduct of the wife. The language of the statute, Section 11993, is plain and the sole function of the courts is to enforce it according to its terms. *Elmwood Place v. Schanzle*, 91 O. S., 354, 357; *Slingluff v. Weaver*, 66 O. S., 621; *Woodbury & Co. v. Berry*, 18 O. S., 456; *Caminetti v. United States*, 242 U. S., 470, 485; *United States v. Detroit First National Bank*, 234 U. S., 245, 258; *United States v. Lexington Mill & Elevator Co.*, 232 U. S., 399; *Lake County v. Rollins*, 130 U. S., 662, 670, 671.

We are of opinion, therefore, that under Section 11993 a court may award to a wife, for whose aggression a divorce has been granted to her husband, a share of such property only as the husband may own at the time of the rendering of the decree. It is not empowered to order payments out of future personal earnings or wages of the husband.

It is urged, however, that the court is bound to presume that the decree, the enforcement of which is sought in these contempt proceedings, included a determination that the husband then owned the property which was ordered to be paid. While it will be presumed in the absence of a showing to the contrary that the court proceeded in accordance with law and found the husband to be possessed of property out of which the payments could legally be decreed, the record is inconsistent with the contention that the decree is an order for the payment of a share of existing real or personal property. On its face it purports to be an alimony allowance. That statement alone is not conclusive. The legal effect of the judgment entry as a whole and not the mere language used must govern. It is not payable from any existing property owned by the husband, nor is the total sum payable fixed or ascertainable. In the case of *Hassaurek v. Markbreit, Admr.*, 68 O. S., 554, at 578' Judge Shauck said:

"The finding of the court * * * that the wife had been absent for more than three years * * * excluded her right to alimony."

He had in mind a distinction between "alimony" and "share of the husband's property," as appears from page 580 of the same case where a reference to what was then Section 5700, R.

S.: "And the court may adjudge to her such share of the husband's real or personal property, or both, as it deems just and reasonable."

Counsel for defendant in error offer the ingenious suggestion that the court in presuming such a state of facts to have existed as would justify the judgment, might assume that the plaintiff at the time of the original trial had an annuity or other fixed source of monthly income without possession or right of possession of the principal or corpus of the estate from which it was derived, and without power of anticipation of the principal. The right to receive such income would undoubtedly be property and a portion thereof would be literally a share of the husband's property. Had such a state of facts existed and had the court adjudged to the wife a share of such property, his obligation would have been limited to the payment of that income, so long as it was received. Insolvency of an obligor of the annuity or other loss of source of income, might destroy the property and would excuse further payments, if the court had merely transferred to the wife an interest in such property. The terms of the decree in the case at bar preclude such possibility. Under its terms, the payments go on indefinitely.

It appears, therefore, that the order of the trial court in the divorce case was not a direction for the payment of a share of the property, but was an order for the payment of permanent alimony. They are different in their nature. If the order were alimony, it might be modified upon a change of circumstances and conditions. If it were in the nature of a permanent division of the husband's property, it would be a final determination of the rights of the parties in that respect. *Fenn v. Fenn*, 23 C. C. (N. S.), 205 (affd. 83 O. S., 731); *Lally v. Lally*, 152 Wis., 56; *Norris v. Norris*, 162 Wis., 356, and note in 1 A. L. R., 1106.

If the court was without power to grant alimony to the defendant, and, if what it did grant constituted alimony, can the validity of the decree be brought in question in this case? If the court which has jurisdiction renders a judgment which

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it has the power to make, but which is merely erroneous, its decision can not be attacked collaterally. *Bly v. Smith*, 94 O. S., 110. Though a court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments, and, if it makes a decree which is not within the powers granted to it by the law of its organization, the decree is void. *Standard Oil Co. v. Mo.*, 224 U. S., 270, 281, 282; *Works on Courts*, 2nd Edition, Section 8; *Windsor v. McVeigh*, 93 U. S., 274, 282; 15 R. C. L., 853.

The power of the court is limited to adjudge a share of the husband's real or personal property. Its attempt to do more than that being in excess of its powers, is of no legal effect. It follows, therefore, that the order of committment by the court of insolvency for failure to obey that part of the decree which was void was improper.

The judgment will be reversed.

HAMILTON and CUSHING, JJ., concur.

**RIGHTS OF UNPAID SELLER OF GOODS IN POSSESSION
AS BAILEE.**

Court of Appeals for Lucas County.

THE TOLEDO PULP PLASTER CO. v. CHAMBERS ET AL.

Decided, March 10, 1919.

*Unpaid Seller Holding Mortgage on Goods Sold—Rights of as Against
Subsequent Purchaser Before Recording of Mortgage.*

1. By virtue of the provisions of Section 8560, General Code, the rights of a mortgagee of chattels are superior to those of a subsequent purchaser, who became such before the mortgage was deposited with the proper recording officer, but with knowledge of its existence.
 2. Under Section 8434, General Code, the unpaid seller of goods, may exercise his right of lien even though he is in possession as bailee of the purchaser.
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Warren J. Duffey and George C. Bryce, for plaintiff in error.
Edward H. Ray, contra.

RICHARDS, J.

Heard on error.

The Toledo Pulp Plaster Company commenced an action in the court of common pleas for the replevin of a two-ton Velie automobile truck, claiming to own the same, and to be entitled to the immediate possession, and that the truck was wrongfully withheld by the defendants. The plaintiff secured the possession of the truck by virtue of the replevin thereof, and the trial resulted in a judgment in favor of the defendants in the sum of \$876.64, the defendants not having executed a bond for the return of the property.

We are asked to reverse this judgment as being contrary to law and the evidence. The bill of exceptions discloses that the truck was sold by the defendants, who were the owners of it, to one John Johnson, on the morning of April 17, 1917, and that in part payment of the same they took from Johnson a chattel mortgage on the truck, in the amount of \$800, securing certain notes, and placed the mortgage on file in the proper office at 11:45 o'clock, a. m., of that day. Immediately after the sale of the truck to Johnson he caused it to be driven to the office of the plaintiff company, and there consummated an agreement which had been discussed between him and the plaintiff, by which he sold the truck to the plaintiff, the value of the same to be credited upon a pre-existing indebtedness owing from him to the plaintiff, excepting that plaintiff advanced to Johnson a check of \$280 to enable him to pay that amount to the defendants. Some six or eight months after the purchase by the plaintiff of the truck, it delivered the same to the defendants for the purpose of having certain repairs made, and upon the completion of the repairs tendered to the defendants the reasonable value of the repairs and demanded the return of the truck. The defendants, however, refused to deliver it to the plaintiff without payment of the mortgage held by them, amounting to \$800 and interest, which was then past due, and

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on such refusal this action in replevin was brought. The controversy between the parties is over the matter of priority, the plaintiff contending that it purchased the truck in good faith, before the mortgage which had been given by Johnson to the defendants had been deposited by the defendants with the county recorder, as required by statute. The plaintiff further contends that even if the mortgage of the defendants is prior, they are estopped from asserting the same as a ground for withholding the delivery of the truck, because they had received the same as a bailee for the purpose of repair simply, and on tender of the proper charge for repairs, the defendants would, in no event, have the right to retain possession of the truck. The defendants contend that the mortgage held by them is the prior lien, and that the plaintiff had knowledge of their mortgage when it purchased, and therefore did not purchase the truck of Johnson in good faith, and that the amount represented by the notes and mortgage held by defendants being past due they were justified in retaining possession until their claim was paid.

The priorities as between the parties to this action are to be determined by the provisions of Sec. 8560, G. C., which reads as follows:

“Section 8560. A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section.”

If this section were to be given its grammatical construction, and due consideration given to the comma which appears after word “purchasers,” there is basis for argument that the requirement of good faith, which is imposed on mortgagees, does not apply to purchasers, and if such construction were adopted then a purchaser who buys property which is under chattel mortgage, even with knowledge thereof, the mortgage not having been left with the proper recording officer, would

be entitled to priority over the mortgage. In view, however, of the history of this section, we can not give it the construction suggested. The section was originally enacted by the General Assembly on February 24, 1846, and is found in 44 O. L., 61, and as there published the section contains no comma after the word "purchasers." This section is printed in the same form in 1 S. & C. Statutes, 475, and met with no change from the date of its enactment until it appears in the general revision of the statutes in 1880, where it is designated as Sec. 4150. The evident legislative intent, evidenced by the section as originally enacted, was to group subsequent purchasers with mortgagees and to require that each should act in good faith in order to be entitled to priority over a chattel mortgage which had not been deposited as contemplated by that section. We can not hold that the insertion in the revision of 1880 of a comma after the word "purchasers" is sufficient to change the meaning of the act and to exempt such purchasers from the requirement of good faith. It is said in *State, ex rel Nimberger v. Bushnell*, 95 Ohio St., 203, that the re-enactment of a statute in a code or revision does not change its meaning or construction unless the language of the revision clearly manifests the legislative intent to make such change.

Reason indicates that subsequent purchasers and mortgagees should be grouped together in the statute. Purchasers invest relying on their judgment as to the value of property, and secure title thereto by their purchase. Mortgagees take their security relying on their judgment as to the value of the property and become the general owner, as laid down in *Robinson v. Fitch*, 26 Ohio St., 659. This suggestion strengthens the view that the section quoted was intended to group purchasers and mortgagees and make them subject to the same provision of good faith, and this view is further strengthened by the language of Sec. 8565, G. C. That section provides for the re-filing of a chattel mortgage within the thirty days next preceding the expiration of the first filing, and contains a provision rendering it void against certain classes of persons unless so re-filed, the classes of persons mentioned being creditors, subse-

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quent purchasers and mortgagees in good faith; and the section contains no comma after the word "purchasers." The two sections must be construed together; each section to impose the same duty and confer the same rights on purchasers.

We hold, therefore, that in order to entitle the plaintiff to protection as a purchaser of the truck he must have become such in good faith, and it has been so stated in the course of the opinion in *Cooper v. Koppes*, 45 Ohio St., 625. The court, speaking through Owen, C. J., uses the following language on page 630:

"The penalty which the statute had denounced against every unfiled mortgage, or conveyance intended to operate as a mortgage, of chattels unaccompanied by immediate delivery, and followed by continued change of possession, is that it shall be absolutely void as against creditors and *bona fide* purchasers and mortgagees."

The evidence as to knowledge of the plaintiff at the time of purchase is in conflict. The defendant Chambers testified that before the sale from Johnson to the plaintiff was effected, he notified the plaintiff over the telephone that the defendants held a mortgage upon the truck, and there are some circumstances tending to corroborate this claim. The telephone conversation is denied by the plaintiff, but the trial judge found with the defendants on this proposition, and there being sufficient evidence in the record to sustain such finding we must decline to interfere therewith.

It is, however, insisted that the defendants, having received the truck as bailees, and for the purpose of repair, were not entitled to withhold the delivery of the same from the plaintiff on tender of their proper charges for making the repairs. Counsel contend that the case falls within the general rule announced in 6 Corpus Juris, 1108, and that the defendants are estopped from setting up any claim under their mortgage without first having redelivered the property to the plaintiff, who was the bailor. Other authorities are cited which announce the same doctrine, but we hold the rights of the defendants are controlled by the language of paragraph 2 of Sec. 8434, G. C., and

that the sellers, in this case the defendants, may exercise their right of lien, notwithstanding they were in possession of the truck as bailee of the buyer. It is not necessary to inquire what the rule of law might be in the absence of this statute, but by reason of the language of this statute the defendants were not estopped to set up their claim as they did, under the mortgage, insisting that by the provision of the mortgage, they were entitled to take or hold possession because they considered their security endangered.

We call attention to the state of the record in this case. The journal entry shows that the judgment was rendered on the 28th day of September, 1918, while the motion for new trial was filed on May 13, 1918. Suspecting that counsel for plaintiff would be unlikely to file a motion for new trial before they were defeated, we have examined the trial docket of the court of common pleas and find, according to the notation on that docket, that this case was decided on May 9, 1918. Counting from that date, the motion for new trial was in time, the 12th day of May having been Sunday. We suggest that the record could be corrected by a *nunc pro tunc* order in the trial court.

Judgment affirmed.

KINKADE and CHITTENDEN, JJ., concur.

MISREPRESENTATION IN APPLICATION FOR ACCIDENT INSURANCE.

Court of Appeals for Hamilton County.

CONNECTICUT GENERAL LIFE INS. CO. v. RICHARDSON.*

Decided, June 18, 1919.

Contracts of Insurance—Controlled by Law of the Place Where Made—Construction of Section 9391, Relating to Misrepresentations by an Applicant for Insurance.

1. The validity, nature and effect of a contract are governed by the law of the place with reference to which such contract is made.

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2. Where a statute relates to a remedy the law of the place where the court sits governs.
3. Section 9391, General Code, relating to misrepresentations by an applicant for insurance, is applicable to a policy of accident insurance.
- * Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 25, 1919.

W. J. Hammersly, Louis B. Sawyer and Robertson, Buchwalter & Oppenheimer, for plaintiff in error.

Robert Ramsey, contra.

CUSHING, J.

Heard on error.

Defendant in error, Gertrude Galt Richardson, recovered a judgment on an accident insurance policy issued by plaintiff in error, insuring Charles C. Richardson against loss resulting from bodily injuries and death through external, violent and accidental causes.

The petition stated that Charles C. Richardson died, December 31, 1915, from external, violent and accidental means, viz., by drowning; that he had performed his part of the contract; that proofs of loss were made according to provision of the policy, and that the company refused payment under the policy.

The amended answer admitted incorporation and undisputed facts. It defended on three grounds: that the statement in decedent's application that he had not been refused insurance in this or any other company was false; that the answer to question M in the application was false; and that the answer to question P in the application was false. The reply to the answer was a general denial.

Four questions are presented by this record:

1. That the policy was a New York contract and the court erred in holding that the issue of misrepresentation was to be determined by the law of Ohio.

2. That the Ohio statute regarding misrepresentation has no application to accident insurance.

3. That the plaintiff failed to meet the burden of prov-

ing accidental death and in overruling defendant's motion for a peremptory instruction.

4. That the alleged misrepresentations in the application were shown without a conflict of testimony, and the refusal of the court to give a peremptory instruction on that ground was error.

These questions will be considered in the order stated. Section 9391, G. C., provides:

"No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer."

The claim is made that as the agent of Richardson resided in New York and the policy was countersigned and delivered there, it was a New York contract and the statute of Ohio was inapplicable. There is no question as to the validity of the contract raised in this case. The section under consideration provides what must be established before any answer in an application will bar a recovery, and under what condition such an application may be used in evidence on a trial to recover on a policy of insurance.

The validity, nature and effect of a contract are governed by the law of the place with reference to which it is made. Where a statute relates to the remedy the rule is that the law of the country where the court sits shall govern.

"But not that portion which relates to matters of procedure only, such as the admission of evidence, and the rules of evidence. The latter are matters which affect the remedy and are governed by the law of the country where the court sits which is asked to enforce the contract." *Union Central Life Ins. Co. v. Pollard*, 94 Va., 146 (26 S. E., 421; 36 L. R. A., 271; 64 Am. St., 715); *Massachusetts Benefit Life Assn. v. Robinson*, 104 Ga., 256, 287 (30 S. E., 918; 42 L. R. A., 261); *Nelson v.*

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Nederland Life Ins. Co. Ltd., 110 Ia., 600 (81 N. W., 807) ; and *New York Life Ins. Co. v. Block*, 12 L. R., 224.

Section 9391, G. C., is remedial. It provides when an application for insurance may be used in evidence, and when it will bar a recovery in an action on a policy based on such application.

Counsel for plaintiff in error contend that Sec. 9391, G. C., is not applicable to a policy of accident insurance, and the history of the statute is traced to establish that the intent of the Legislature was to confine the operation of that section to life insurance. An examination of the arguments and authorities in support of them is foreclosed by the affirmance by the Supreme Court, in 73 Ohio St., 340, of the case of *Standard Life & Accident Ins. Co. v. Sayler*, 2 N.P.(N.S.), 305. Counsel for plaintiff in error represented the insurance company in that case. It established the law that an insurance company doing a business of "life" and "accident" insurance is within the purview of old Sec. 3626, Rev. Stat., the predecessor of Sec. 9391, G. C., The presumption is that the codification of that section did not change its meaning or effect. *State v. Stockley*, 45 Ohio St., 304, 309; *Allen v. Russell*, 39 Ohio St., 336; *Warren v. Davis*, 43 Ohio St., 447; *State v. Shelby Co. (Comrs.)*, 36 Ohio St., 326, 330, and 2 Sutherland on Statutory Construction (2 ed.), Sec. 451.

The court did not err in applying that section in the trial of this case.

On the question that the plaintiff failed to meet the burden of proof that death was caused through external, violent and accidental means. The deceased, when last seen alive, was at the reservoir getting a drink of water, which act required him to reach a short distance over the concrete wall toward the center of the reservoir. Some hours afterwards his body was found in the water.

In submitting the fact to the jury on this issue the trial court correctly stated the law. It required the jury to consider and determine whether the death was caused by external, vio-

lent and accidental means, or whether disease or other cause directly contributed to the death.

If the contentions of plaintiff in error are correct, when a human being is last seen standing near a body of water, and some hours later his drowned body is found in the water, suicide will be presumed, in the absence of direct proof of accident.

It is the law of Ohio that when a person is drowned, the presumption is against suicide. *Travelers' Ins. Co. v. Rosch*, 3 C. C. (N. S.), 156, affirmed 69 Ohio St., 561.

The fourth ground urged by plaintiff in error, that the policy was void for misrepresentations in the application and error of the trial court in refusing a peremptory instruction on that ground, will not be discussed. The basis of counsel's contention is that this is a New York contract and that Sec. 9391, G. C., is not applicable. We have found that the law of Ohio on insurance policies relates to the remedy, and that by a decision of the Supreme Court of Ohio, above referred to, Sec. 9391 is applicable to injuries resulting in death. The court, therefore, properly overruled the motion for a peremptory instruction. The materiality of the representations by decedent was fairly submitted to the jury. Its verdict will be regarded as a finding that any untrue representations were not material.

Judgment affirmed.

SHOHL and HAMILTON, JJ., concur

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VALUATION OF GOODS LOST THROUGH MISDELIVERY.

Court of Appeals for Cuyahoga County.

NEW YORK, CHICAGO & ST. LOUIS RY. v. EUCLID BUILDERS
SUPPLY CO.

Decided, June 27, 1919.

*Carriers—Shipment Lost to Consignee Through Misdelivery—Liability
Therefor may not be Limited to Value at Shipping Point, Including
Freight Charges, When.*

The provision of a bill of lading that, in case of loss, the damage for which the carrier is liable shall be computed on the basis of the value of the goods at the time and place of shipment, including freight charges, is against public policy and will not be enforced, where such provision was not agreed to in consideration of a reduced freight rate, and the freight rate was not based on the value of the goods, and where the goods were misdelivered without fault on the part of the shipper or consignor.

M. B. & H. H. Johnson, for plaintiff in error.

H. B. Fuller, for defendant in error.

WASHBURN, J.

Heard on error.

Defendant in error, The Euclid Builders Supply Co., had consigned to it a carload of lime, to be shipped from one point in Ohio to another point in Ohio, over the road of the plaintiff in error, The New York, C. & St. L. Ry.

The shipment arrived at the place of destination, which was Cleveland, but instead of the railway company delivering the lime to consignee, it delivered the same to a competing concern, and the consignee not having consented to such delivery and not being at fault brought this suit to recover the value of the lime.

The case was submitted upon an agreed statement of facts, and the only question to be determined is as to whether or not

the provision of the bill of lading, that the amount of loss or damage should be computed on the basis of the value of the property at the place and time of shipment, is a valid provision, binding upon the parties. If that provision is not valid, the judgment of the municipal court for \$205.97, the value of the property at the place of destination and time of delivery, is correct; and if said provision is valid then the judgment of the lower court should have been for \$121.72, the value of the property at the place and time of shipment.

The provision of the bill of lading in question is as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid."

This provision was not agreed to in consideration of a reduced freight rate, nor was the freight rate based upon the value of the goods.

The misdelivery of the goods, when neither the shipper nor consignee were at fault, was a conversion of the property by the carrier, and but for the above provisions of the bill of lading the carrier would be liable, at common law, for the value of the goods at the place of conversion, which was the place of delivery stipulated in the bill of lading.

The delivery to another was either knowingly wrongful or plainly the fault and negligence of the carrier, and in a shipment of the character shown in this record it is against public policy to permit the carrier to limit his liability, in whole or in part, for the loss occasioned by his negligence or wilful act:

"1. Where a common carrier claims immunity for the loss of goods with which he had been intrusted, on the ground that such immunity is secured by a special agreement, the burden is on him to prove that the loss was occasioned without his fault.

"2. The only effect of such an agreement is to relieve the carrier from the liabilities imposed by the common law where he is free from fault or neglect." *Union Express Co. v. Graham*, 26 Ohio St., 595.

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“Where the action against the carrier is to recover on his common-law liability for losses occurring at the point of delivery, after the transit is ended, but before notice of delivery to the consignee, and the defendant claims exemption from such loss by virtue of a condition of the bill of lading to that effect, he must aver and prove, not only that this condition was assented to, but that the loss happened without any fault or neglect on his part, and the failure to establish such assent or show due and proper care to prevent the loss, entitles the plaintiff to recover.” *Gaines v. Union Transportation & Ins. Co.*, 28 Ohio St., 419.

“A common carrier is liable for the value of the goods lost through its negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such an agreement can at most cover a loss arising from some cause *other than the negligence or default* of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted.” *United States Express Co. v. Backman*, 28 Ohio St., 144.

It is true that in Ohio, as elsewhere, in cases where the loss was not occasioned by the wilful act or negligence of the carrier, an agreement fixing the amount of recovery in case of loss, entered into in consideration of a reduced freight rate, has been upheld. Such was the case of *Baltimore & O. Ry. v. Hubbard*, 72 Ohio St., 302 (74 N. E., 214), where the court pointed out that the provision in that case was not a stipulation to exempt from liability for negligence. The same principle is applied in *Pennsylvania Co. v. Shearer*, 75 Ohio St., 249 (79 N. E., 431; 116 Am. St., 730; 9 Ann. Cas., 15).

But we hold that the doctrine of these cases does not apply where the loss is occasioned by such wilful act or gross negligence of the carrier as amounts to a conversion by him, and where there was no reduced freight rate granted as a consideration for the stipulation

We are the more readily led to this conclusion by a consideration of the growth and development of public policy in ref-

erence to this general subject as shown by the decisions of the United States courts, the courts of the various states, and the laws passed by Congress and the Legislature of Ohio. Before there was any statutory enactments on the subject the provision involved in the case at bar was upheld in many cases, and even after there was legislation by Congress the Interstate Commerce Commission approved such a provision, particularly where there was a reduced freight rate to support it. which led to further legislation by Congress, and recently the Interstate Commerce Commission on its own motion made another investigation on the subject, and, "upon investigation of all the facts of record and of the common law affecting bills of lading, its modification by federal statutory law, and the duties and powers of the commission thereunder," found that the provision here in question was unlawful and void in respect to property not shipped under rates dependent upon declared or agreed values, as in the case at bar.

This ruling is supported by many well-reasoned cases, one of which is the case of *M'Caull-Dinsmore Co. v. Chicago, M. & St. P. Ry.*, 252 Fed., 664, which was decided after the recent enactments by the United States Congress on the subject. In that case, in view of the fact that the liability of the carrier would have been at common law the value of the goods at the point of destination at the time when they should have been delivered, and in so much as that was the actual loss to the shipper caused by the failure of the carrier to deliver the goods at that time and place, it was determined that the stipulation in question in a bill of lading was a limitation of the liability of the carrier and of the amount of recovery, and was, therefore, unlawful and void.

In view of the federal legislation on the subject, the holdings of the United States courts thereafter, and the action of the Interstate Commerce Commission, if the shipment in the instant case had been made from one state to another the validity of the provision in question would not be claimed. The desirability of uniformity in such matters is recognized as a matter of public policy in a recent case in the Supreme Court of Ohio, *Erie*

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Ry. v. Steinberg, 94 Ohio St., 189, 223 (113 N. E., 814; 1917 E Ann. Cas. 661).

Moreover, we think that this same public policy is indicated by the laws enacted by the Legislature of Ohio in recent years. Section 8993-1, G. C., provides that bills of lading for intra-state shipments shall contain certain provisions; Sec. 8993-2, G. C., provides that other terms and conditions may be inserted in such bills of lading provided they are not contrary to law or public policy; and Sec. 8994-1, G. C., provides that a carrier shall be liable for any loss, damage or injury to the property shipped, and that, "No contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

If the doctrine of the earlier cases in Ohio to the effect that a carrier can not, by contract, exempt himself from liability for full damages for loss occasioned by his negligence or wilful act, was in any degree modified by *Baltimore & O. Ry. v. Hubbard*, *supra*, and *Pennsylvania Co. v. Shearer*, *supra*, that doctrine is restored by the above acts of the Legislature, and the public policy of the state is thereby established.

It is not necessary to determine the effect of such a provision in a case where the loss was not occasioned by the gross fault or neglect of the carrier. We hold that the provision in question, as applied to the facts of this case, where there was no reduced freight rate and the loss was occasioned by the gross negligence of the carrier, is contrary to the public policy of the state, as evidenced by the acts of the Legislature and the decision of the courts of the state, and the court below was right in not enforcing it.

Judgment affirmed.

DUNLAP and VICKERY, JJ., concur.

SUBCONTRACTORS' LIENS UNDER THE MECHANICS' LIEN LAW.

Court of Appeals for Cuyahoga County.

GANNON ET AL V. POTTER, TEARE & CO.

Decided, March 20, 1919.

Mechanics' Liens—No Privity Between Owner and Subcontractor Prior to the Mechanic's Lien Law—Effect of Subcontractor's Failure to File Notices—Material Furnished Direct from Workshop or Factory—Omission of Name of Materialman—Invalid Affidavit.

1. Prior to the enactment of the mechanics' lien law no privity of contract existed between a principal owner and a subcontractor or materialman who furnished labor or material to a principal contractor, and hence a subcontractor could not maintain an action against an owner for labor and materials.
2. The amendment to Section 8312, General Code (106 O. L., 522), providing that the failure of a contractor to furnish affidavits required by the mechanics' lien law should not be a bar or defense in any action to collect claims after the sixty days for filing liens had expired, does not permit suit by a subcontractor who has failed to file the notices required by such law.
3. Since Section 8328-8, General Code, declares the mechanics' lien law to be a remedial statute which is to be liberally construed, a valid lien is established by a subcontractor who had furnished materials from his own workshop or factory and paid for the same, although his affidavit does not state such facts or set forth the names of any materialmen, but merely recites "paid in full" in the space provided for the names of materialmen.
4. Where a materialman has in fact furnished material, but his name is omitted from the affidavit by a subcontractor, such omission is fatal to the creation of a lien in favor of such subcontractor.
5. An affidavit which contains the name of the subcontractor only at the beginning and end thereof, but elsewhere contains the name of the party not seeking to perfect a lien, is not executed in compliance with the law and is equivalent to no affidavit.

S. V. McMahon and F. W. Zimmerman, for plaintiffs in error.

Dorr E. Warner, for defendants in error.

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DUNLAP, J.

Heard on error.

This cause comes into this court on error to the municipal court of the city of Cleveland. That court rendered a decree finding that the cross-petitioners, defendants in error, had valid mechanics' liens for the amount of their claims. The case was heard on an agreed statement of facts. The essential parts thereof will appear in this opinion.

The Gannons, plaintiffs in error, made a contract with the firm of Berry Brothers to construct a dwelling on premises owned by them. Berry Brothers constructed the building and thereafter became bankrupt, owing these cross-petitioners for labor and material furnished in the construction of the building. All of the defendants in error filed mechanics' liens for the amount of their claims. Before filing their liens each of the cross-petitioners paid in full for the labor and material used by them respectively in the construction of the building, and no lien was filed for labor and material furnished to any of the cross-petitioners.

The legal questions involved in the case are, first, as to the necessity, for the validity of these liens, of the subcontractors' affidavits or sworn notices, which are apparently required by Sec. 8312, G. C.; and, second, as to whether such affidavits or sworn notices as were given are sufficient under the law, assuming that they are necessary.

As to the first proposition it is to be noted that the cross-petitions filed in this case were brought to establish the validity of the liens; that is, to foreclose them. No action is brought on any one of them to collect by law, as other claims are collected, consequently the amendment to Sec. 8312, G. C. (106 O. L., 522), which provides as follows: "When the sixty days within which any liens can be filed have expired, and no liens on account of such improvement exists, then the failure of the contractor to furnish such affidavit as herein provided shall not act as a bar or defense in any suit or cause of action to collect any claim or claims by law as other claims are collected," has no application, because these liens existed by force of the stat-

ute alone. They have no existence at common law, and this statute can not be used to create a claim that is enforceable otherwise than as a lien. As a lien it must either stand or fall. There is no debt existing between the principal owner and the subcontractor or materialman outside of or independent from this lien. It is purely a matter *in rem*. This amendment was made necessary, or at least advisable, on account of some unfortunate words in the original section which apparently took away from the original contractor the right to sue for work done and materials furnished until the "statements provided for in this section are made and furnished in the manner and form as herein provided" even after the period in which liens for subcontractors and materialmen could be filed; a right which he had always enjoyed and which was undoubtedly taken away from him by inadvertence. In our view the amendment simply restored this right. It never gave, and never, was intended to give, the subcontractors and materialmen, who had no privity of contract with the owner, a right to sue independent of their lien. Indeed, we are not clear that such right is so claimed for this amendment in argument, but it is claimed that this amendment permits suit upon liens after the sixty-day period regardless of whether or not the notices required by the statute, and which are said to be prerequisite to a lien, are filed. As we have indicated, we regard this amendment as doing nothing but restoring a right which the contractor had apparently lost, and these claimed liens must stand or fall upon their own validity, which is to be determined by whether or not they substantially comply with the provisions of the statute.

In our opinion the statute requires the delivery of the sworn statements provided for therein to the owner, showing the names of every laborer in his employ who has not been paid in full, and also showing the name of every subcontractor in his employ and of every person furnishing machinery, material and fuel, and giving the amount, if any, that is due or to become due to them or any of them for work done, or machinery, material or fuel furnished, etc., as provided for by the statute. We adopt this, then, as one of the legal premises necessary in

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reaching what we consider a logical conclusion of the questions involved in this case.

This consideration disposes of the claims of J. J. Lynch and John Weenik & Sons, who we hold have no lien, because, according to the agreed statement of facts, they did not make out and deliver to the owner any affidavits at all, but relied solely upon filing their mechanics' liens with the recorder. In our opinion the allowance of their liens by the court below was erroneous.

Now in the claims of Foley & Bean and H. C. Adams there were no subcontractors or materialmen. The agreed statement of facts shows that such materials as these two subcontractors used came out of their own shops, their own warehouses or stores. It is plain that no affidavit that could be presented could show the names of materialmen under such a situation, if there were none to show. It is not argued or claimed that this impossible statement should have been made. It is only claimed that the affidavit or sworn statement should state *that* fact instead of stating, as the sworn statements in those cases did state, "paid in full." This objection to these affidavits seems to us to be too technical and to be a fine splitting of hairs. If the statute were to be strictly construed, and if no liens could be obtained except by most strictly complying with each requirement, then there would be force in the argument, but Sec. 8323-8 provides:

"This act is hereby declared to be a remedial statute and to be construed liberally to secure the beneficial results, intents and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for and to give jurisdiction to the court to enforce the same."

Surely a liberal construction would allow an affidavit to be used such as used in this case; that is to say, assuming that it complied in all other respects with the statute and simply omitted the names of materialmen for the reason that there were no names that could be given; then the simple use of the words "paid in full," while perhaps not the most available words to

describe the situation, would not be misleading, and ought, therefore, nevertheless to be sufficient, and we feel that a different holding would violate the spirit of the law and especially the directions contained in the section just quoted. We therefore hold that the affidavits of the two subcontractors or materialmen just mentioned are not defective upon the grounds just stated, and that in that particular respect they sufficiently comply with the requirements of the law. We shall consider later the claim of H. C. Adams upon another objection raised.

With regard to the sworn statement supplied by the cross-petitioner Yates, in this particular respect a different situation exists. In his case there was a materialman, and his name could have been inserted in the affidavit, but was not. We hold, following the construction placed upon this law by Judge Sater, of the United States district court for the southern district of Ohio, in a case entitled, *In the Matter of the Kinnane Co.*, 62 Bull., 37 (14 O. L. R., 532), that such sworn statement is insufficient for the reason that it does not contain the name of the materialman.

It is to be mentioned that Judge Sater's opinion in that case was rendered before amendment of the statute above quoted, but we think in that respect the statute was not changed by this amendment and that his ruling, if correct, still applies. It was, therefore, error on the part of the court to allow the claim of William Yates.

We must at this point go back and consider further upon another question, the claim of H. C. Adams, which we have held correct upon one of the objections raised. Another objection is raised to it which is of a very peculiar nature. The scrivener who prepared the affidavit in that case evidently prepared the affidavit both of Foley & Bean and H. C. Adams, and the H. C. Adams affidavit is a carbon copy of the Foley & Bean affidavit, but all of the body of the affidavit, excepting only the opening, which changes the name from Foley & Bean to H. C. Adams, is identical with the Foley & Bean affidavit, and as an illustration the part of the affidavit which relates to materialmen says as follows:

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“Said affiant further says that the following shows the names of every persons furnishing machinery, material or fuel to Foley and Bean.”

Indeed, in every place where the name “H. C. Adams” should be, the name “Foley and Bean” appear, excepting at the end of the affidavit, where it is signed by H. C. Adams. We are forced to hold that this affidavit does not in any respect comply with the provisions of the law; that it is in fact equivalent to no affidavit at all; and that for that reason the lien of H. C. Adams should not have been allowed by the court below, and its allowance was error.

We have now disposed of the claims of each of the cross-petitioners, finding that the court erred in the allowance of all of the claims excepting only in the allowance of the lien of Foley & Bean. We therefore reach the conclusion that this judgment should be reversed and the cause remanded to the municipal court with instructions to disallow the claims of H. C. Adams, William Yates, John Weenink & Sons and J. J. Lynch, and to allow the claim of Foley & Bean.

Judgment reversed, and cause remanded.

WASHBURN and VICKERY, JJ., concur.

LIABILITY FOR EXISTENCE OF A NUISANCE.

Court of Appeals for Wood County.

PERRYSBURG BANKING CO. v. DESHLER (VIL.).

Decided, March 10, 1919.

Nuisance—Injuries Resulting from—Holder Without Knowledge of Legal Title to the Premises—Not Liable for Claim for Damages Settled by the Municipality.

A bank which has never been in possession of real estate nor exercised any dominion over it, but holds the legal title thereto for the mere purpose of securing an indebtedness owing to it and has no knowledge of the existence of a nuisance thereon, is not required to reimburse a municipality for damages for personal injuries which the municipality has been compelled to pay by reason of the existence of the nuisance.

Thomas L. Gifford and Fries & Hatfield, for plaintiff in error.

W. W. Campbell, Fred Gribbel and R. W. Cahill, contra.

RICHARDS, J.

Heard on error.

On March 19, 1914, Beatrice A. Cox, a child then about seven years of age, was injured on Keyser avenue in the village of Deshler, while passing along a sidewalk. In an action brought to recover damages therefor, she recovered a judgment against the village for \$500.

The present action was brought by the village against the Perrysburg Banking Co., which is claimed to have been the owner of the property at the date of the injury and to have been responsible for the defective condition, to reimburse the village for the amount of said judgment and costs and for \$150 attorneys' fees incurred in defending the action.

The case was tried to the court without the intervention of

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a jury, resulting in a judgment in favor of the village and against the banking company in the amount of \$860.26.

We have examined all of the errors claimed to exist in the record, but find it necessary in this opinion to discuss only one of them, as the decision on that assignment of error will necessarily dispose of the whole controversy.

One of the defenses in the answer of the Perrysburg Banking Co., is that it was not, at the time of the injury of Beatrice A Cox, the owner of the property, and never had been such owner, but that it had the mere legal title to the property, as security for an indebtedness of \$1,120 owing to it, and that therefore it is not liable, in any event, for the existence of the claimed defect.

It appears from the record that the Sibert Mercantile Co. became the owner of this property in the year 1910 and continued to occupy and use the same for business purposes. The Sibert Mercantile Co. was indebted in the amount of about \$9,000, which was secured by sundry mortgages on this property, one of the mortgages in the amount of \$2,000 being held by the Perrysburg Banking Co. An action in foreclosure was commenced by one of the mortgagees against the Sibert Mercantile Co., making other lienholders parties defendant, and such proceedings were had in that case that a decree was rendered finding the amount due the various lienholders, and the property was advertised to be sold at sheriff's sale. Immediately before the day of sale, an agreement was made whereby the Sibert Mercantile Co. borrowed \$8,000, giving a mortgage to secure the same upon the property, and as this amount was insufficient to pay the entire indebtedness, it agreed with the Perrysburg Banking Co., in consideration of \$1,000 paid to the bank on its claim, to convey the property to Thomas L. Gifford, as trustee. This transaction was carried out, a deed made to Thomas L. Gifford, as trustee, for the consideration of \$1 named therein, and a written declaration of trust was executed by the trustee, showing the terms under which he held the conveyance of the property, these terms being, in substance, that upon the payment of the balance of the indebtedness due

to the Perrysburg Banking Co., within one year from the date of the deed, which was April 19, 1912, the trustee would reconvey the property to the Sibert Mercantile Co., but in default of such payment within the time named, the trustee agreed to convey the property to the Perrysburg Banking Co. The amount remaining due the bank was not paid within the year and on the expiration of the time named, Gifford, as trustee, in consideration of \$1, executed a deed of the property to the Perrysburg Banking Co., which deed bears date of April 21, 1913. All these deeds were placed on record.

The Sibert Mercantile Co. continued all this time to occupy the premises. The consequences flowing from possession are stated in the following terms in 20 Ruling Case Law, 352:

“It is a general rule of law that the possession of real property is a fact putting all persons on inquiry as to the nature of the occupant’s claims as well as the claims of the person under whom he occupies.”

So far as the record shows, the bank never paid any taxes or insurance, or made any repairs on the property, or exercised any act of dominion over the same in any manner. Neither does the record disclose that the bank ever received any rent for the property or expected to receive any.

We have no hesitancy in reaching the conclusion that the device adopted of securing the indebtedness to the bank left the bank in the position of a creditor of the Sibert Mercantile Co., and the whole transaction must be construed to be, in fact, a mortgage to secure the indebtedness held by the bank.

The answer of the bank alleges that the transaction was so construed by the court of appeals of Henry county in certain litigation pending therein. That decision can not be *res adjudicata* in this case, for the reason that the village of Deshler was not a party to the proceedings. Nevertheless we reach the same conclusion as was announced by the court of appeals in that action.

The defect which caused the injury to Beatrice A Cox arose from a stairway leading to an upper story, along the side of

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the building on this property. This stairway projected some two feet over the sidewalk, and from the outer edge of the stairway a portion of the railing, consisting of a strip of iron about two inches wide and from one-eighth to one-half an inch thick, and several feet long, had become detached at the lower end, and this end projected out still further over the sidewalk, and the iron being still attached at the upper end, the lower end could be swung back and forth over the walk, and was at times out over the walk a considerable distance and at other times remained against the side of the stairway. This condition had existed for some six or eight months prior to the injury to the child. The bank is located in the village of Perrysburg, which is situated in another county and approximately 30 miles distant from Deshler, and it does not appear that it or any of its officers, ever had any actual notice of the defect. Without doubt a jury would be justified in finding that the condition existing amounted to a nuisance, and it is insisted that under the doctrine announced in *Morris v. Woodburn*, 57 Ohio St., 330, the bank is liable to respond to the village for the amount of damages recovered by the injured person and for the attorneys' fees incurred by the village in making the defense. The case cited is explained and its application limited in *Wilhelm v. Defiance*, 58 Ohio St., 56. We can not, however, extend the doctrine, which is limited to an owner, so as to include one who has made a loan to the real and beneficial owner and has taken a conveyance merely for the purpose of securing the indebtedness, and where the transaction amounts merely to a mortgage for the purpose of securing the indebtedness. The bank exercised no act of dominion over the property and had no knowledge of the defect. It never had been in possession of the property, nor received any rents therefrom. It was in no sense the beneficial owner of the property. The doctrine announced in *Morris v. Woodburn*, *supra*, can not be applied to a case involving such circumstances.

The judgment which was rendered in the court of common pleas includes \$150 attorneys' fees, but the record contains no evidence showing the value of such services. In the absence

of evidence, it is error to include an allowance for the amount of the attorneys' fees.

The trial court declined to admit in evidence the written declaration of trust executed by Thomas L. Gifford, trustee. This instrument, when executed, having been submitted to the parties, was competent evidence and should have been received. However, the record contains no prejudicial error in this respect as oral testimony was received showing the entire transaction.

Judgment reversed and cause remanded for further proceedings.

CHITTENDEN, J., concurs.

KINKADE, J.

I concur in the judgment of reversal and in the opinion, except that part of the opinion which cites 20 Ruling Case Law, 352, as applicable here. I can see no proper application in this case of the principle there announced.

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RECOVERY OF AMOUNT PAID ON A FALSE CLAIM.

Court of Appeals for Cuyahoga County.

BURTON V. GREIF ET AL. *

Decided, March 3, 1919.

Administrator—Payment of a False Claim By—Recovery Not Barred by the Filing of a Final Account.

The settlement of the final account of an executor or administrator, which shows a false payment of a debt against the estate, no such debt having existed, is no bar to a subsequent action against such executor or administrator for the recovery of such money by one who is legally entitled thereto.

Error.

Bartholomew, Leeper & McGill and *Florence E. Allen*, for plaintiff in error.

Fackler & Woods, for defendants in error.

WASHBURN, J.

In January, 1918, Katherine Kurz Burton filed a petition in the common pleas court, in which she alleged that she was entitled, as residuary legatee, to a certain part of the estate of Katherine Hoffman, of which estate the defendant, William Greif, was the executor; that said executor in 1904 and 1905 wrongfully misapplied funds of said estate, and for the purpose of deceiving plaintiff and the probate court in reference to such misapplication of funds, filed an account in 1906 in the probate court in which he falsely and fraudulently took credit for having paid a debt against the estate, which did not exist, by which means funds of the estate belonging to plaintiff were wrongfully and fraudulently diverted and lost; that said account was duly approved by the probate court in December,

*Motion to require the Court of Appeals to certify the record in this case overruled by the Supreme Court, June 10, 1919.

1906; and that plaintiff did not discover said fraud until 1917. The prayer of the petition is for judgment for damages caused by said fraud.

There are four other causes of action of a somewhat similar nature set forth in the petition.

To this petition a demurrer was filed for the reasons, as stated therein, that it appeared on the face of the petition: first, that the court had no jurisdiction of the subject of the action; second, that several causes of action were improperly joined; third, that the action was not brought within the time limit for the commencement of such action; and, fourth, that the petition did not state facts sufficient to constitute a cause of action.

The court below overruled the demurrer as to the second and third grounds, and sustained the demurrer as to the first and fourth, and it appearing that the plaintiff did not desire to amend or plead further judgment was rendered in favor of the defendant.

That judgment is now before this court for review on error proceedings duly prosecuted by the plaintiff below.

We fail to see wherein the petition does not state a cause of action to recover damages for a fraud practiced by the defendant. The only claim made in this behalf, so far as we can see, is that insomuch as the petition alleged that the fraudulent account was approved by the probate court no right of action could grow out of the transaction until the account was attacked and set aside. This contention gives to the approval of the account an altogether too all-embracing and conclusive character. The approval of such an account is not an adjudication of the rights of a person who has a right to a distributive share of an estate and has not been paid. The statute is merely for the purpose of perpetuating evidence of payments and is not intended as a means by which a right to receive payments is adjudicated.

“The settlement of the final account of an executor or administrator showing the payment of money to a person not entitled thereto, is no bar to a subsequent action against him for

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the recovery of the money by one who is legally entitled to the same." *Banning v. Gotshall*, 62 Ohio St., 210 (56 N. E., 1030).

Especially would this be so where it was claimed that the executor filing the account practiced a fraud not only upon the plaintiff but also upon the probate court.

We see nothing in the mere approval of the account which prevents an action to recover damages for the fraud practiced upon the plaintiff and the court, by means of which the approval of said account was obtained and the property of the plaintiff misapplied, and, if a cause of action is stated, we do not see how there could be any question about the common pleas court having jurisdiction to try the case.

We think the court below was right in its ruling on the question of the statute of limitations. The statute does not begin to run until the discovery of the fraud, which the petition alleges was discovered in 1917, and the petition was filed in January, 1918; and likewise the court was right in overruling the demurrer based on the ground that several causes of action were improperly joined.

For error in sustaining the demurrer on the first and fourth grounds thereof, and in rendering judgment for the defendant, the judgment is reversed and the cause remanded.

Judgment reversed, and cause remanded.

DUNLAP and VICKERY, JJ., concur.

ADVERSE POSSESSION OF A RAILWAY RIGHT-OF-WAY.

Court of Appeals for Warren County.

SCHENCK v. CLEVELAND, CINCINNATI, CHICAGO &
ST. LOUIS RY. CO.

Decided, May 28, 1919.

Court Clothed with Function of a Jury—Where Both Parties Request a Directed Verdict—Prescriptive Right-of-Way—Color of Title not Essential to—Adverse Possession of a Right-of-Way—Non-user Essential to Abandonment of—Use of Right-of-Way for Other than Main Tracks.

1. Where, at the conclusion of all the evidence in the case, each party requests the court to instruct a verdict in his favor, the parties thereby clothe the court with the functions of a jury. Where plaintiff does not request that the case go to a jury upon the facts, the verdict rendered under the instruction of the court will not be set aside unless clearly against the weight of the evidence.
2. It is not necessary to the acquisition of a right-of-way by prescription that the occupancy be under color of title.
3. The possession of a right-of-way which was not permissive, but continuous, open, notorious and exclusive, was necessarily adverse.
4. To constitute an abandonment of a right-of-way there must be non-user together with an intention to abandon. The intention can be established by unequivocal and decisive acts clearly indicative thereof.
5. Where a railroad moves its main tracks from a right-of-way, but continues to use the right-of-way for railway purposes in storing cars and for access to certain stock pens, non-user is not established.

Patrick Gaynor, for plaintiff in error.

H. N. Quigley and Eltzroth & Maple, contra.

SHOHL, J.

Heard on error.

Plaintiff in error, Cornelia B. E. Schenck, who was likewise plaintiff below, brought an action against the defendant for occupying a strip of land, used by it for railroad purposes, from March 29, 1913, to the date of the petition in June, 1913.

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The defendant below pleaded, first, the general issue; second, title in it by prescription; and third, want of jurisdiction.

The record shows that in 1866 one C. A. Brown, the then owner of the property in question, gave a mortgage to R. P. Evans, which mortgage remained unpaid until 1872. In 1871 Brown executed a quitclaim deed to a right of way 100 feet wide to the Cincinnati & Springfield Railroad, which contained the proviso: "Whenever the said railway company shall abandon the project of constructing said railway, then this release shall be null and void." In 1872 Evans brought suit to foreclose the mortgage. The parties in interest having appeared, a sale of the property was had under orders of the court, and the property was sold unincumbered. The railroad therefore was without any right in the premises, but it and its successors continued to hold, occupy and use them until 1911, a period greatly in excess of the prescriptive statutory period. In 1911 the railroad relocated part of its line between Dayton and Cincinnati, and removed its tracks, ties, etc., from the land in question, which is within the limits of Franklin, Warren county. However, it left two sidetracks on the land, using them to store cars and to load stock in a pen there. The land was always used for railroad purposes. In 1913 part of the main line was destroyed in the flood and the defendant railroad company, the successor of the Cincinnati & Springfield Railroad, returned and relocated its main tracks on the premises in controversy, in substantially the same place that they had been originally constructed.

At the close of all the evidence the defendant renewed a motion for an instructed verdict, which the court then granted.

The record shows:

"At this point, the plaintiff moves the court to instruct the jury that plaintiff is entitled to a verdict, and the only thing that they must consider is the amount of damages to which plaintiff is entitled."

They thereby submitted their case to the court.

Where, at the conclusion of all the evidence in the case, each party requests the court to instruct a verdict in his favor, the

parties thereby clothe the court with the function of a jury. *First National Bank v. Hayes & Sons*, 64 Ohio St., 100 (59 N. E., 893). The plaintiff did not request to go to the jury upon the facts, and the verdict rendered by the jury under the instruction of the court will not be set aside by the reviewing court unless clearly against the weight of the evidence. This is not inconsistent with the rule in *Gibbs v. Girard*, 88 Ohio St., 34, because the right of the plaintiff to a determination by the jury was waived by her when she joined in the request that the matter be decided by the court. *Perkins v. Putnam Co. (Comrs.)*, 88 Ohio St., 495.

On the facts shown in record, after the sale of the property in question free from incumbrances, the railway was without right in the land. It is not necessary to the acquisition of a right of way by prescription that the occupancy be under color of title. *Paine's Lessee v. Skinner*, 8 Ohio, 159; *McNeely v. Langan*, 22 Ohio St., 32, 37; *Humphries v. Huffman*, 33 Ohio St., 395, 403, and *Smith v. Pittsburg, C. C. & St. L. Ry.*, 5 C. C. (N. S.), 194, 198.

The possession of the railroad was not permissive, but was continuous, open, notorious and exclusive. It was necessarily adverse to the purchaser at the foreclosure sale. *Pavey v. Vance*, 56 Ohio St., 162; 2 Corpus Juris., 128, and *James v. Indianapolis & St. L. Ry.*, 91 Ill., 554.

The conduct of the defendant does not establish an abandonment of the right of way. That would require non-user together with an intention to abandon. The intention could be established by unequivocal and decisive acts clearly indicative thereof. *Cleveland & Pittsburgh Ry. v. Ward*, 23 C. C. (N. S.), 465; 33 Cyc., 221; *People v. Southern Pacific Co.*, 172 Cal., 692, 700 (18 Pac., 177); *Stannard v. Aurora, E. & C. Ry.*, 220 Ill., 469 (77 N. E., 254); *Kansas City & S. E. Ry. v. Kansas City & S. W. Ry.*, 129 Mo., 62 (31 S. W., 451); *Roby v. New York Central Ry.*, 142 N. Y., 176 (36 N. E., 1053); *Townsend v. Michigan Central Ry.*, 101 Fed., 757, and 1 Corpus Juris., 8, 9.

Moreover, the record falls short of establishing a case of

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non-user. The defendant was using the right of way for railway purposes in storing cars and for access to the stock pen, even though the main track had been moved. (*Cleveland & Pittsburgh Ry. v. Ward, supra.*) The plaintiff had never made an entry on the land after 1911. It remained separated from hers by a fence that stood continuously for over thirty-three years.

The judgment will be affirmed.

CUSHING, J., concurs.

HAMILTON, J., not participating.

**WIFE NOT ENTITLED TO EXEMPTION IN CHATTEL
MORTGAGED PROPERTY.**

Court of Appeals for Henry County.

PATRICK DONNELLY V. WILLIAM LULFS ET AL.

Decided, December 12, 1918.

Husband and Wife—Exemption in Lieu of Homestead—Not Allowable to Wife from Property Covered by Chattel Mortgage.

The wife is not entitled to five hundred dollars in lieu of homestead out of proceeds of sale on foreclosure of chattel mortgage given by husband on his property.

Donovan & Donovan, for plaintiff in error.

George S. May, O. H. Mosier, Fred Gribbell and *Donovan & Warden*, for defendants in error.

HUGHES, J.

There was taken into the custody of the receiver appointed in this cause, being an action to foreclose a chattel mortgage, the chattel property of the defendant Lulfs and, at a sale ordered by the court, the property sold for \$941.16.

There were three chattel mortgage liens and one judgment with execution lien, against the property. The wife, who signed none of the notes or chattel mortgages, demands \$500 in lieu of homestead as exempt.

It is conceded by all parties that she is entitled to this exemption, if the liens above mentioned do not foreclose the same. It is also conceded by the parties that the first lien is Rothenberger Brothers chattel mortgage for \$61.90. That the second lien is The International Harvester Company's chattel mortgage for \$274.60. That the third is the judgment and execution lien of The Corn City State Bank of Deshler of \$240.42; and that the fourth lien is Patrick Donnelly's chattel mortgage of \$929.20.

The question presented to this court is whether or not the wife is entitled to an exemption in lieu of homestead, notwithstanding her husband has executed chattel mortgages to the full value of the property.

The court below ordered the distribution of the fund in the following order: First, the payment of costs. Second, \$500 to the wife of the defendant Lulfs in lieu of a homestead, and the balance to be distributed to the defendants according to priority of their liens as above set forth.

We find no authority which would prevent a husband from making an absolute conveyance or incumbrance of his chattel property without joining with him in the transaction, his wife. Neither do we find any authority which would preserve to her in such circumstances, any of such chattels as exempt from the operation of such mortgages.

We do not here make any reference to any particular items of chattel property that are particularly exempted, because it is conceded by all parties that none of the chattels involved herein were of such character.

We are constrained, therefore, to hold that this allowance to the wife, prior to the payment of the chattel mortgage, was erroneous. 29 O. S., 523, 25 O. S., 549.

It will be observed, however, that the third lien, which is superior to the Patrick Donnelly chattel mortgage lien, is the Corn City State Bank's judgment lien of \$240.42.

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There can be no question but that the exemption claim of the wife in this case is superior to this judgment lien. The distribution should be, therefore, as follows:

First. The payment of costs.

Second. The claim of Rothenberger Brothers.

Third. The claim of The International Harvester Company.

These three items should then be added, and taken from the proceeds of sale. The Corn City State Bank judgment would then be entitled to participate in any remainder after the \$500 in lieu of homestead was set aside to the wife of the defendant Lulfs. The claim of Patrick Donnelly, however, being for more than enough to consume the entire balance of the proceeds of sale and being superior to the claim for this exemption, there would be no fund left out of which any amount could be paid to Mrs. Lulfs. The amount then remaining should be applied to the Corn City State Bank judgment, and the balance should then be paid to the Patrick Donnelly claim. We make no further observation regarding other claims because it is apparent that this distribution more than consumes the proceeds of sale.

To clarify this opinion, it may be illustrated as follows: Assuming the costs to be \$50; Rothenberger's claim \$61.90; The International Harvester Company's claim \$274.66, these being the first claims paid in their order and amounting to \$386.50; deducting this amount from the selling price of the property, \$941.60, would leave \$554.66. Taking from this amount, the \$500 in lieu of homestead, would leave \$54.66, the amount to be applied on The Corn City State Bank judgment, and this item of \$54.66, added to the distribution made in the three first items would amount then to \$441.16 which, taken from the proceeds of sale, would leave \$500 to be paid on the Patrick Donnelly claim. In other words, assuming that the items of costs and the amounts of the various claims are stated correctly, the distribution would be as follows: Costs, \$50; Rothenberger Brothers, \$61.90; International Harvester Company, \$274.60; Corn City State Bank, \$54.66; Patrick Donnelly, \$500. See, 31 O. S., 273.

: STAY OF A PROCEEDING UNTIL COSTS ARE PAID.

Court of Appeals for Lucas County.

Judges Shohl, Hamilton and Cushing, of the First District, sitting by designation in place of the Judges of the Sixth District.

STATE, EX REL KOHN, V. MANTON, JUDGE.
KOHN V. WHEELING & L. E. RY.

Decided, June, 1919.

*Costs—Adverse Party May Ask for a Stay of Proceedings until Paid,
When—Discretion of Trial Judge in Granting Such an Order—
Mandamus.*

1. Where in a former action, between the same parties and in the same cause, costs have been adjudged against a party, the court upon motion of the adverse party may grant an order staying a subsequent proceeding until such costs are paid.
2. The granting of such an order lies in the sound discretion of the court and is reviewable on error.
3. Where a party against whom such an order has been issued fails to prosecute error proceedings therefrom, a writ of mandamus will not lie to compel the trial court to proceed contrary to the discretion already exercised by such court.

Charles A. Thatcher, for relator in cause No. 804.

Allen J. Seney, Pros. Atty., and *Nolan J. Boggs*, Asst. Pros. Atty., for respondent.

C. A. Thatcher and *G. B. Keppel*, for plaintiff in error in cause No. 805.

C. A. Seiders, for defendant in error.

CUSHING, J.

In mandamus and error.

In cause No. 805 above, plaintiff in error seeks to reverse an order of the common pleas court of September 17, 1918, staying proceedings in said cause until the costs in cause No. 75535, common pleas, are paid.

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Leroy H. Kohn filed an action in the common pleas court, docketed as No. 75535, against Wheeling & L. E. Ry. to recover a judgment for negligence of the company. The case was tried to a jury. It disagreed and a second trial was had. The plaintiff recovered a judgment of \$5,000 against the railway company. This judgment was reversed by the Court of Appeals for Lucas county, and the case came on for trial for a third time before John P. Manton, judge of the court of common pleas for Lucas county, and a jury. At the trial, William Lawler was called as a witness on behalf of the plaintiff. He was examined in chief, cross-examined, re-examined and dismissed. Plaintiff recalled Lawler, and counsel stated that he desired to correct the testimony he had given on cross-examination. On objection by counsel for the railway company, and statements by counsel for plaintiff, the court asked the witness at two different times whether he desired to correct anything in his testimony. To each inquiry Lawler answered "No." Kohn then dismissed his action without prejudice to a future action.

August 12, 1918, a motion was made to stay proceedings in cause No. 77967 until the costs taxed against Kohn in cause No. 75535 were paid. The motion was granted.

September 17, 1918, it was made to appear to the court that the order of August 12, 1918, had not been entered on the journal. On September 17, 1918, the court stayed proceedings as of August 12, 1918.

November 12, 1918, Judge Manton signed and allowed a bill of exceptions to this order in cause No. 77967. The bill of exceptions has never been filed in the court of appeals. Neither the original papers nor a transcript of the docket and journal entries have been filed in the court of appeals. The petition in error was filed in the court of appeals December 19, 1918. This was ninety-two days after the order of September 17, 1918. There is nothing before this court to review on error.

The order of Judge Manton in staying proceedings until the costs were paid was the exercise of a discretion vested in the court, and reviewable on error. *Arnold v. Pittsburg Coal Co.*, 5 N. P. (N. S.), 329. That such orders are reviewable on

error as affecting a substantial right of litigants has been decided in both Indiana and New York.

“The only penalty we know of for the bringing and the voluntary dismissal of a civil action, including one of this class, is that the plaintiff shall pay all costs he has occasioned. This, generally, he must do before he is authorized to renew his suit. While the costs of a dismissed action remain unpaid, the commencement of a subsequent suit for the same matter * * * will be stayed by the court upon a proper application until paid.” *Wait v. Westfall*, 161 Ind., 648, 651 (68 N. E., 271).

“Where costs have been adjudged against plaintiff in a former action in the Supreme Court between the same parties for the same cause of action, defendants were entitled to an order staying subsequent proceedings until such costs were paid, in the absence of any proof authorizing the court to deny a motion for such stay in the exercise of its discretion.” *Lederer v. Krausz*, 90 N. Y. Supp., 402.

In cause No. 804, wherein it is sought to mandamus Judge Manton to hear cause No. 77967, this action can not be maintained. As we have pointed out, the discretion vested in Judge Manton was exercised in his stay of the proceedings. That order was reviewable. The plaintiff failed to prosecute error within the time provided by the statute. Section 12285, G. C., provides:

“The writ [mandamus] may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it can not control judicial discretion.”

These two cases were tried together. The court exercised discretion, and it now sought by mandamus to compel him to proceed contrary to the discretion already exercised. This can not be done. The proceeding in error will be dismissed. The writ of mandamus will be denied.

Petition in error dismissed.

Writ of mandamus denied.

SHOHL and HAMILTON, JJ., concur.

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Cuyahoga County.

RACE DISCRIMINATION.

Court of Appeals for Cuyahoga County.

FRANCIS YOUNG v. F. J. PRATT.

Decided, March 3, 1919.

*Civil Rights—Colored Man Refused Accommodation at a Restaurant—
Whether he Applied for Accommodation in Good Faith Immaterial.*

In an action to recover a penalty under Section 12941, General Code, providing against racial discrimination in public places, good faith upon the part of such guest or patron is immaterial.

H. E. Davis, for plaintiff in error.

David & Heald, contra.

DUNLAP, J.

Heard on error.

The plaintiff in error, Francis Young, who was plaintiff below, brought this action in the municipal court to recover a penalty under Sec. 12941, G. C., also called the Civil Rights Act, for alleged wrongful discrimination, in that the defendant, F. J. Pratt, who was the proprietor of a restaurant, refused to serve plaintiff, a colored man, a meal, because of his color, thereby denying to him the advantages and privileges specified in said action. The trial resulted in a verdict and judgment for the defendant, and it is here sought to reverse that judgment.

There are two errors alleged, one upon the admission of evidence and the other upon the charge of the court. The two matters may be treated together, as the error, if there was any, can hardly be claimed if the charge of the court was correct.

The part of the charge complained of as erroneous is as follows:

“Was he a *bona fide* guest or patron of that place for that purpose, and was he refused on account of his color? That is

the issue for you to determine. If you do determine that he was a *bona fide* guest and a parton of that place and was refused on account of his color, if you determine it by the greater weight of the evidence, then it will be your duty to find in his favor in a sum of not less than fifty dollars and in a sum not to exceed five hundred dollars. However, I charge you that in the event you find that the plaintiff in this action did not seek the public accommodation of this defendant as a *bona fide* guest or as a *bona fide* patron and went there solely and only for the purpose of attempting to obtain a refusal, solely and only for the purpose of stirring up litigation, then I say to you that he can not recover under this statute, because this statute was enacted for the sole and only purpose of protecting *bona fide* guests and patrons of public accommodation places and not for the purposes of financial benefit to any one who attempted to stir up litigation by the use of this statute."

This novel doctrine of *bona fides*, so far as our own research, aided also by the diligence of counsel, discloses, has never before been charged or maintained in any reported case of a similar nature, and we hesitate to stamp so novel a doctrine with the seal of our approval.

The section of the statute under which this suit is brought is unambiguous, and a recovery under the same can not be made to depend upon the intent in the mind of the person seeking the accommodation. In our opinion, if such had been the intent of the Legislature in the passing of this law, the same would have been set out in appropriate words therein. We find no words in this statute that give a colorable right to a court to charge as was done in this case, and we think that to so charge was prejudicial error for which this judgment must be reversed.

Judgment reversed, and cause remanded.

WASHBURN and VICKERY, JJ., concur.

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Cuyahoga County.

**DISCRETION OF COURT IN SETTING ASIDE A JUDGMENT
DURING TERM.**

Court of Appeals for Cuyahoga County.

KORNICK V. HAHN, ADMINISTRATRIX.

Decided, May 29, 1919.

Judgment—Setting Aside of During Term Discretionary—Facts Justifying such Action.

1. The setting aside of a judgment upon motion filed during the term such judgment was rendered is a matter which rests within the sound discretion of the court, and is not subject to review unless an abuse of such discretion be shown.
2. Where a judgment is rendered in the absence of one of the parties, and during the same term such party files a motion to set aside such judgment, showing to the satisfaction of the court that there is substantial merit in his claims, the setting aside of such judgment is not an abuse of discretion, even though such complaining party shows little merit in his excuse for his absence.

Howell, Roberts & Duncan, for plaintiff in error.*Locher, Green & Woods*, contra.

WASHBURN, J.

In this case a judgment was rendered in the court below, and, afterwards, upon a motion filed during the same term, said judgment was set aside and vacated for reasons which the trial court found to be sufficient.

It is urged in this court that there was no good and sufficient reason for setting aside the judgment, and that the trial court abused its discretion in so setting aside the judgment.

There is a marked difference between the power of the court over its judgments during the term at which they were entered, and its power over its judgments when its action is invoked by an application filed at a term subsequent to the term at which the judgments were rendered.

In the former class of cases the court may act on its own motion, and its power is inherent, and its exercise is not controlled by statutory provision; while in the latter class of cases the procedure is entirely statutory and the power of the court depends upon and is controlled by the statute. In the former the court exercises a discretionary power; in the latter a statutory power, although in the exercise of the statutory power there is more or less discretion vested in the court.

Cases arising under the latter class are not controlling, and, indeed, are of little assistance in disposing of a case falling within the former class.

The record here presents a case of the former class, one in which, so far as this court is concerned, the controlling question is, does it clearly appear that the court below abused its discretion?

In reviewing the action of the court in exercising during the term its discretionary power in setting aside a judgment, which was entered in the absence of one of the parties, there are two questions of prime importance to be considered:

1. The reason or excuse of the complaining party for his absence.

2. Whether or not the claims of the complaining party in the controversy have substantial merit.

If the record discloses that there is substantial merit in the claims of the complaining party, and that in all probability a grave injustice has been done, the court's action in setting aside the judgment and giving the complaining party a chance to be heard will not be considered an abuse of discretion, even though there is little merit in the excuse for his absence.

A consideration of the record in this case leads us to the conclusion that there is substantial merit in the claims of the party in whose behalf the court below exercised its discretion, and that it does not clearly appear that the court below abused its discretion.

Judgment affirmed.

DUNLAP and VICKERY, JJ., concur.

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Franklin County.

REDUCTION OF BOND IN INTEREST OF ESTATE.

Court of Appeals for Franklin County.

WOLFE ET AL, TRUSTEES, v. FIDELITY & DEPOSIT CO.

Decided, January 9, 1919.

*Trusts and Trustees—Authority of Probate Court to Reduce Bond—
Saving of Expense to the Estate a Sufficient Justification—Not Sub-
ject to Collateral Attack.*

1. Under Section 10591 General Code, the probate court has authority to reduce the amount of the bond of a trustee, accept a new bond, and discharge the sureties upon the former bond, where it finds such action to be to the best interest of the estate.
2. Where there are compensated sureties upon the original bond, the cost of which is paid by the estate, the reduction of such premium charge resulting from reducing the bond is sufficient to support a judgment of the probate court in ordering a new bond in reduced amount and in releasing the sureties upon the former bond.
3. Such action of the probate court in accepting the new bond and releasing the sureties upon the former bond is within the jurisdiction of such court and therefore can not be collaterally attacked.

Edward C. Turner, for plaintiffs in error.

Daugherty, Todd & Rarey, for defendant in error.

KUNKLE, J.

Heard on error.

In the lower court the plaintiffs in error were defendants and the defendant in error was plaintiff.

It appears from the petition that the plaintiff below, a surety company, sought to recover judgment against defendants below, as trustees under the will of Henry C. Pirrung, deceased, in the sum of \$2,500, for premium on a bond upon which it was surety for such trustees.

Defendants below were required by law and the order of the probate court to give a bond or bonds for the faithful dis-

*Affirmed by the Supreme Court, November 11, 1919.

charge of their duties as such trustees. The amount of such bond or bonds to be so given by said defendants as such trustees was fixed by the probate court at the total sum of \$1,750,000.

. The defendants below jointly gave three several bonds as such trustees. Two of such bonds were in the sum of \$500,000, and one was in the sum of \$750,000. One of the said \$500,000 bonds was executed April 5, 1915, and, among other things, was conditioned as follows:

“That if the said trustees should well and truly do, perform and discharge with fidelity all and singular the duties which they, as such trustees, should do, perform and discharge, and act in all things as required by law, and faithfully account for all money and funds that might come into their hands as such trustees, then said bond should be void: that otherwise the same should be and remain in full force and virtue in law.”

A copy of the bond is attached to the petition.

The petition recites that the defendants are still acting as such trustees under said appointment and that the estate has not been settled or the trust terminated; that to procure the plaintiff to sign and execute the bond as surety the defendants and each of them severally made application to plaintiff in writing, and in said application defendants and each of them agreed that in consideration of the plaintiff executing or guaranteeing the bond the defendants would pay in advance the sum of \$2,500 premium, upon execution of the bond, and the sum of \$2,500 annually thereafter until plaintiff should be furnished with satisfactory and conclusive evidence of the termination of its liability under said bond: that plaintiff accepted said applications, and each of them, and duly signed and executed said bond, and thereby became liable for any default of said trustees, or either of them, in the particulars recited in said bond: and that the liability of plaintiff on said bond has not been terminated.

The petition also states that a further premium in the sum of \$2,500 has become due and payable, but defendants have failed and refused to pay the same or any part thereof, and therefore ask judgment in the sum of \$2,500.

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Defendants below filed an answer which in brief states that on April 5, 1916, on their application and showing that the total amount of their said bonds, namely \$1,750,000, was excessive and burdensome, and unnecessary for the protection of said trust estate, the probate court—ordered in due form made and entered upon said application and the evidence adduced—reduced the bond or bonds which should thereafter be given by said trustees to the total sum of \$1,250,000, and ordered that the trustees should immediately give a new bond or bonds in the total sum of \$1,250,000, with sureties to the approval and satisfaction of the court and conditioned according to law, for the faithful discharge of their duties as said trustees; that on April 5, 1916, said trustees did, pursuant to said order, give new bonds as said trustees in the total amount of \$1,250,000, with sureties to the acceptance and approval of said probate court; and that thereupon said probate court duly ordered that said bonds given April 5, 1915, including the bond upon which said plaintiff company was surety, should be no longer operative for the protection and indemnity of said trust estate for accounts or transactions thereafter occurring, and that said plaintiff company was, on said 5th day of April, 1915, to take effect on and after said 5th day of April, 1915, released and discharged as surety on said bonds.

Plaintiff below demurred to the answer upon the ground that the probate court was without jurisdiction to release plaintiff as surety on said bond.

This demurrer was sustained upon the ground that the probate court had no jurisdiction to release the surety company, and the court held that the trustees were liable upon their separate applications to the said surety company.

Defendants below not desiring to plead further, a final judgment was rendered in favor of the plaintiff, and from such judgment defendants below prosecute error to this court.

Plaintiffs in error in substance claim that the lower court erred:

1. In holding that said demurrer did not constitute a collateral attack upon a proceeding of the probate court.

2. In holding that the probate court was without jurisdiction to release a surety unless the Legislature first passed a statute authorizing such action, and providing for notice, etc., because the beneficiaries of the estate had a vested interest in the bond.

3. In holding that although defendants had been sued jointly as trustees, they might be held liable jointly as individuals.

We have carefully considered the pleadings in this case and also the very helpful briefs filed by counsel. We shall, however, not attempt to discuss in detail the various authorities cited by counsel.

Section 10591, G. C., provides:

“Every trustee appointed in a will, before entering upon his duty as such, must execute a bond with freehold sureties, payable to the state, in the probate court of the county in which such will is admitted to probate, to the satisfaction of the court, conditioned for the faithful discharge of his duties as trustee; except that, when by the terms of a will, the testator expresses a wish that his trustee may execute the trust without giving bond, the court admitting the will to probate, may grant permission to the trustee to execute the trust with or without bond. When granted without bond, at any subsequent period, upon the application of a party interested, the court may require bond to be given; and, upon the application of an interested party, if deemed necessary, require a new or additional bond at any time before the completion of the trust.”

Section 10214, G. C., provides:

“The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice. The rule of the common law, that statutes in derogation thereof must be strictly construed, has no application to such part; but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature.”

The section of the code first above quoted, expressly provides for the giving of a new or additional bond. Under this section of the code the probate court upon the application of an inter-

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ested party can authorize or require either a new or an additional bond to be given.

We can not concur in the suggestion that the giving of a new bond and the giving of an additional bond mean one and the same thing.

We think the Legislature intended to confer upon the probate court discretion either to require an additional bond or to authorize the giving of a new bond, according to the circumstances of the case. We also think the said trustees were interested parties, as provided by Section 10591, and could make an application for the giving of a new bond.

In the case at bar it appears that the probate court found there was a necessity for decreasing the amount of the bond of said trustees. The finding as to such necessity is not disputed.

It is clear that the action of the probate court was beneficial to the trust estate, because it materially decreased the cost charged against the estate as premium in favor of the compensated surety. It is clear that such advantage could not be secured except by the execution of a new bond and a release of the sureties upon the old bond. It is a matter of common knowledge that in the administration of trust estates, and especially when compensated sureties are involved, the circumstances frequently justify a reduction of the amount of the official bond.

Section 10214, G. C., above quoted, requires a liberal construction of the provisions of part three and all proceedings thereunder. We think a liberal and practical construction of Section 10591 authorizes the acceptance by the probate court of a new bond and the incidental release of the sureties upon the old bond.

Counsel for defendant in error have cited and reviewed in their brief many cases from other jurisdictions to the effect that the acceptance of a new bond will not operate to release the sureties upon the old bond in the absence of a statute expressly authorizing such release. We acknowledge the weight of such authorities, but think most of those cases can be distinguished from the case at bar upon the ground that they did not involve a statutory provision similar to Section 10591, G. C., and a statutory rule of construction similar to Section 10214.

Notwithstanding the rule announced in the cases so cited we find a contrary rule established by the Supreme Court of the United States in the case of *Veach v. Rice*, 131 U. S., 293.

In this case an effort was made to hold the sureties upon both the original and the new bonds, but the court held that the original bond was discharged by the giving and acceptance of a new bond, and, at page 317, the court, in referring to the case of *Justices v. Selman*, 6 Ga., 432, say:

“The second section of an act of 1812 came under consideration, which read as follows: ‘Any executor, executrix, administrator, administratrix or guardian, whose residence may be changed from one county to another, either by the creation of a new county, removal or otherwise, shall have the privilege of making the annual returns required of them by this act, to the Court of Ordinary of the county in which they reside, by having previously obtained a copy of all the records concerning the estates for which they are bound as executors, executrix, administrators, administratrix, or guardian, and having had the same recorded in the proper office in the county in which they then reside, and having given new bond and security, as the law directs, for the performance of their duty.’

“The court held, Lumpkin, J., delivering the opinion, ‘That the mere taking of a new bond does not, necessarily, release the old sureties, and especially when the new bond is taken by authority of law, for the purpose of strengthening the existing security,’ but that when the second or subsequent bond is given for a new and different undertaking, it operates, *ipso facto*, as a discharge of the prior parties and hence that when the provisions of the act are fully complied with the sureties on the first bond are discharged from all further liability on account of their principal.

“We are of opinion that the court erred in rendering a decree against the sureties on the joint bond of Erwin and Gray for a *devastavit* committed after June 12, 1876.”

In the case at bar the purpose of the new bond was not to strengthen an existing security, but was expressly intended to reduce the amount of the bond and the cost of premium chargeable against the trust estate.

This object could only be accomplished by the release of the former sureties.

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We think the probate court had jurisdiction under the circumstances disclosed by the pleadings, and the provisions of our code above cited, to make the order for a new bond and to release the sureties upon the old bond.

The finding and order of the probate court being within the jurisdiction of the court, is subject to the well established rule against collateral attack, *Shroyer v. Richmond*, 16 Ohio St., 455; *Union Sav. Bank & Trust Co. v. Western Union Tel. Co.*, 79 Ohio St., 89; *Wilberding v. Miller*, 90 Ohio St., 28, and various other Ohio authorities.

It therefore follows that the judgment of the court of common pleas should be reversed, and, if the plaintiff below desires to file a reply to the answer, the case will be remanded. Otherwise this court will proceed to render the judgment which the lower court should have rendered.

Judgment accordingly.

ALLREAD and FERNEDING, JJ., concur.

RIDICULE OF POLITICAL VIEWS.

Court of Appeals for Summit County.

ALBERT C. HOLLOWAY v. SCRIPPS PUBLISHING CO.

Decided, July 7, 1919.

Libel and Slander—Ridicule of Political Views or Arguments—Not Actionable Without Proof of Special Damages.

Printed words of ridicule or contempt, which relate solely to political views or arguments on questions of public interest and do not attack the character of a person and do not impute immorality or a violation of law, but merely tend to lessen a man in public esteem or to wound his feelings, are not actionable without proof of special damages.

Holloway & Chamberlain, for plaintiff in error.

Allen, Walter, Young & Andress, for defendant in error.

WASHBURN, J.

Heard on error.

Plaintiff, Albert C. Holloway, sued the defendant, The Scripps Publishing Co., to recover damages for publishing in its newspapers certain purported news items concerning plaintiff, which it is claimed, contained libelous matter.

There was no allegation of special damages.

Defendant filed a motion to strike out certain parts of plaintiff's petition, and that motion was granted to which ruling plaintiff excepted. Thereafter plaintiff filed an amended petition, to which defendant filed a demurrer, which was sustained by the court, and plaintiff not desiring to plead further, judgment was entered dismissing plaintiff's petition. To this action of the court plaintiff excepted and now prosecutes error to this court, seeking to reverse the judgment below.

It is unnecessary to discuss whether or not the court below erred in granting the motion to strike out, as we find that it was proper for the court to strike out at least a part of what was stricken out, but we shall consider the sufficiency of the petition as if the matter stricken out were still in the petition.

The publications complained of were made on the 4th, 5th and 14th days of June, 1917, when this country was associated with England in a war against Germany, but before the Espionage act was in force. For the purposes of this inquiry the allegations of the petition are taken to be admitted to be true, but that does not admit that the articles were wholly and entirely false but only those parts of the articles which, if true, would tend to subject plaintiff to public hatred, contempt or ridicule.

On June 4th, the defendant, in reporting the proceedings of a public meeting at which the plaintiff appeared and spoke, published the following:

“ ‘Wilson Sold People to England,’ is declaration of Socialist Orator. ‘President Wilson sold out his Country to the English. He double-crossed his own people.’—Attorney A. C. Holloway of Akron. ‘If there is any one guilty of treason it is President Wilson.’—Attorney Alex Pattey of Cleveland. The above un-American utterances were the high spots in addresses

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delivered before a body of Socialists in Central Labor Union Hall, Sunday afternoon. Joseph Wein and H. E. Longacre said they would fight Holloway's admittance into the ranks of the Army and Navy Union. Both said Holloway recently served notice that he would apply for membership. He has attended several meetings of the organization. Holloway said: 'Congress is composed of a bunch of hypocrites and liars. They have all sold out their country.' "

In its issue of June 5th defendant published the following:

"Holloway will be kicked out by U. S. W. V. Official, says Socialist Attorney, violated oath and must be ousted. A. C. Holloway, Atty., 439 Akron Savings & Loan Building, started something Sunday when, in an address to Jewish Socialists at Central Labor Union Hall, he made the statement that Wilson had double-crossed the people of this country and had sold out to the English. Officials of Camp Willford, Spanish-American War Veterans, said Tuesday that steps would be taken at the Wednesday night meeting to oust Attorney Holloway from the organization, as a result of his Sunday address. Joseph Wein, prominently identified with Akron organization of Spanish War Veterans, said steps would be taken to oust Holloway out of the ranks. 'Holloway has violated the oath that he took when he was admitted to membership, and under our rules and regulations the only thing left to do is to oust him.' "

And in the issue of its paper of June 14th defendant published the following:

"Third party to enter ticket in the race for all city offices. A third party is to have a City Ticket in the race this Fall, with a complete ticket from Mayor on down the list. Circulation of petition started Thursday. There will be no Socialist ticket in the field, but the new Citizens' Ticket will be a combination of Socialists, Free Thinkers, and others of the Democratic and Republican parties not in sympathy with the selective service Army plan. Albert C. Holloway, William F. Pottin, will be candidates for office on the new ticket, it was reported. Holloway is said to be grooming himself for the mayoralty race."

The question is, admitting that said statements were untrue and that plaintiff can not prove that any special damages resulted from their publication, can he nevertheless maintain an action of libel?

If the statements complained of had been published by word of mouth instead of being printed in a newspaper, no action could have been maintained without special damage being alleged and proven.

Words, to be actionable, must come within one of the following classes:

1. Words importing an indictable offense.
2. Words tending to prejudice one in his office or calling.
3. Words involving moral turpitude of such a character as to tend to his exclusion from society.

The Supreme Court of Ohio, in *Davis v. Brown*, 27 Ohio St., 326, 328, referring to the above propositions, declares that, "These rules have long been recognized and repeatedly affirmed in Ohio." In *Hollingsworth v. Shaw*, 19 Ohio St., 31, the Supreme Court says: "An action of slander can not be maintained for calling the plaintiff *a deserter*, without averment and proof of special damage." It then quotes from 1 Starkie, Slander, 21, as follows:

"No charge, however foul, will be actionable, without special damage, unless it be of an offense punishable in a temporal court of criminal jurisdiction."

The charge in the last mentioned case was made during the civil war and involved the highest degree of disgrace and infamy, and yet, because it was not an indictable offense, the right of action was denied.

In referring to these settled rules, the Supreme Court has declared its unwillingness to extend the class of cases in which recovery can be had for slander without proof of special damages, even going to the extent of holding that words spoken of a man imputing to him an act of sodomy were not actionable without an allegation of special damages, because sodomy was then not an indictable offense under the laws of Ohio.

It is certain that if the publications in the case at bar had been by speaking, instead of printing, the rule applied in the foregoing cases would have to be applied to the case at bar, and it would follow that to state a good cause of action the petition would have to contain an allegation of special damages.

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But in many jurisdictions there is a well-recognized difference between words spoken and matter that is written and published concerning a person.

This distinction was stated in an early Ohio case, *Watson v. Trask*, 6 Ohio 531, 533, as follows:

“Whatever charge will sustain a suit for slander where the words are merely spoken, will sustain a suit for libel, if they are written or printed and published, and many charges, which, if merely spoken of another would not sustain a suit for slander, will, if written, or printed and published, sustain a suit for libel. Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form, of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace.”

It is true that in some cases the soundness of this distinction is doubted, but its existence in Ohio is established. *State v. Smily*, 37 Ohio St., 30.

While this difference between slander and libel is recognized in Ohio, and is stated in the very broad, general terms, quoted above, it seems to be settled by the great weight of authority, that, even if printed, and published, mere words of ridicule, which tend to lessen a man in public esteem or to wound his feelings, are not always actionable without proof of special damages. Both of the cases in Ohio in which the rule has been referred to were cases where the publication charged the plaintiff with a serious violation of moral law, although not a technical violation of the criminal law, and when the authorities are carefully considered in the light of a sound public policy we think that to come within the rule permitting recovery, without proof of special damages the printed words of ridicule or contempt must relate to matters which are required either by the moral code or the law of the land. liberally and not technically construed; printed words of ridicule or contempt which relate solely to political views or arguments on questions of public interest, and which do not attack the character of a person, and

do not impute immorality or a violation of law, come within the rule applicable to spoken words, and are not actionable without proof of special damage.

The acts and views attributed to the plaintiff in the publications complained of in the case at bar related to political matters or matters of governmental policy. To criticise the president, even in time of war, if it does not give aid and comfort to our enemies, is not immoral, and except as limited by the espionage act (which was not then in force) is not illegal. To question the wisdom of the acts of Congress is not a crime in a democracy. It may be unwise and tend to make one politically unpopular. It seems to us quite apparent that at the time of the alleged criticism of the resident and Congress, such alleged criticism, if made, would not have subjected plaintiff to an action for libel or slander. If plaintiff had said that the President had sold out this country to England,, that would have been a severe and intemperate comment on matters of public interest and general concern, but the public would have understood it to sure, at that time, but not a charge that the President had been guilty of an immoral act or the violation of any law. Plaintiff had the moral and legal right to express opposition to the policy of the government, and, while such criticism of the President would probably have subjected plaintiff to contempt and ridicule for his political views, it would not have subjected him to contempt and ridicule for an immoral or illegal act. Many authorities sustain the proposition that it is not libelous to charge a man with doing that which he may lawfully do and which is not a violation of the moral code. *Bennett v. Williamson*, 4 Sandf. (N. Y.), 60; *People v. Jerome*, 1 Mich., 142; *Homer v. Engelhardt*, 117 Mass., 539; *Goldberger v. Philadelphia Grocer Pub. Co.*, 42 Fed. 42; *Urban v. Helmick*, 15 Wash., 155; and *Foot v. Pitt*, 83 App. Div. (N. Y.), 76.

We are not unmindful of the fact that the situation in the country, and the state of public opinion, made the criticisms attributed to plaintiff unpopular with all right-thinking people, but the subject-matter being political, and the views attributed to plaintiff being neither immoral nor illegal, we hold that the

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acts charged in the publications did not expose plaintiff to hatred, contempt, ridicule or disgrace in the sense or to the degree required to make the publications actionable without proof of special damages.

We reach this conclusion not without difficulty and doubt, but it is our best judgment after a very thorough consideration of the record and the authorities.

Judgment affirmed.

DUNLAP and VICKERY, JJ., concur.

LIEN OF MORTGAGE ON AFTER-ACQUIRED PROPERTY.

Court of Appeals for Miami County.

E. W. CLARK, TRUSTEE, v. STRICKLER BROS. CANNING CO.

Decided, July 30, 1919.

Corporation Mortgages—Covering After Acquired Property—Not Prior to the Liens of Subsequent Mortgages Without Notice of Said Provision.

A mortgage executed by a corporation other than a railway company, which purports to include all "after acquired property" of the mortgagor, although duly recorded is not a prior lien upon such after acquired property as against subsequent mortgagees or lienholders who obtain their liens without actual notice of such "after acquired" clause in the former mortgage.

E. H. & W. B. Turner, for plaintiff.

E. H. & R. A. Kerr, for defendant.

KUNKLE, J.

Heard on appeal.

The question presented for consideration in this case relates to the validity of the "after-acquired property" clause contained in the mortgage executed by the Strickler Bros. Canning

Co., to E. W. Clark, trustee, which mortgage was given to secure certain bonds of the Strickler Bros. Canning Co.

The mortgage definitely described certain real estate then owned by the Strickler Bros. Canning Co. and also contained a clause to the effect that the mortgage should cover all "after-acquired" property of the said mortgagor.

After the execution of the mortgage, the Strickler Bros. Canning Co. purchased from A. W. Timmer two additional lots in Tippecanoe City.

In brief, it appears that on May 11, 1915, the Strickler Bros. Canning Co. executed and delivered to the Monroe Building & Loan Association, a mortgage for \$1,500 on these two lots, so purchased from A. W. Timmer, which mortgage was recorded in volume 103, page 365, of the Mortgage Records of Miami County; that on June 19, 1915, the Strickler Bros. Canning Co. executed and delivered to A. W. Timmer a mortgage for \$917.50 upon the two lots in question, which mortgage was recorded in volume 119, page 247, mortgage records of Miami county, Ohio; that the mortgage to A. W. Timmer was to secure the balance of the unpaid purchase money for the said two lots and that the money realized from the mortgage to the building and loan association was deposited by the Strickler Bros. Canning Co. in a local bank and was by it checked out on the same day to Timmer Bros. for lumber furnished to secure a building on the lots so purchased from A. W. Timmer.

The evidence does not establish the fact that either the building and loan association, A. W. Timmer or Timmer Bros. had actual notice of the "after-acquired property" provision contained in the mortgage previously given by the Strickler Bros. Canning Co. to E. W. Clark, trustee.

E. W. Clark, trustee, claims a prior lien on the proceeds arising from the sale of the property acquired by the Strickler Bros. Canning Co. from A. W. Timmer, namely: Lots Nos. 88 and 89. The building and loan company, A. W. Timmer and Timmer Bros. dispute the validity of such "after-acquired property" clause contained in the mortgage given to E. W. Clark, trustee, in so far as the same affects their liens.

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Counsel for E. W. Clark, trustee, rely largely upon the case of *Reed v. Ginsburg & Sons*, 64 Ohio St., 11, and particularly upon the following paragraph in the opinion of Judge Davis, at page 24:

“The argument that the mortgage on after-acquired property is operative only as a contract to mortgage and that a new mortgage must be executed in order to acquire a lien in behalf of the bond holders on that property, is untenable and hardly calls for analysis.”

We think the decision in the case at bar must be governed by the registry statutes of Ohio, and by the decisions of our courts construing the same. In view of the existence of definite registry statutes in Ohio, some of the decisions quoted from other states would have no application.

The case of *Reed v. Ginsburg & Sons*, *supra*, related to a railroad mortgage, given in pursuance of special statutory authority, and we think the language of Judge Davis as used in that decision should be limited to the particular case under consideration.

Our Supreme Court, in the case of *Coe v. Columbus, P. & I. Ry.*, 10 Ohio St., 372, held both in the syllabus and in the opinion that a railroad mortgage containing a clause covering “after-acquired property” merely created an equity in the after-acquired property” may be, we think a mortgage other than one executed by a railroad company must comply with the registry act in order to enable the mortgagee to obtain priority over subsequent innocent holders of valid legal mortgages or liens.

In our opinion, this conclusion must be reached, under our registry statutes, otherwise the clear purpose and intent of such statutes would be greatly weakened or entirely destroyed.

We think the Legislature, in view of the peculiar nature of railroad property and the public interests to be subserved, intended by the enactment of the special railroad statutes to confer authority upon railroads to mortgage their property as an entirety and thereby to include after-acquired property.

We are impressed with the reasoning and logic found in the decision of the case of *Maher v. Smead Heating & Ventilating*

Co., (5 Circ. Dec., 159; 11 C.C., 381). While this decision was rendered before the decision in the case of *Reed v. Ginsburg, supra*, yet we think the distinction as to after-acquired property between mortgages given by railroad companies and those given by other persons or corporations is well stated by Judge King in his decision in this case.

Decree accordingly.

ALLBEAD and FERNEDING, JJ., concur.

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Authority to appoint the clerk of a municipal court of a charter city is in the appointing officer or board as prescribed by the city charter. 117.

COVENANTS—

A purchaser under a contract which binds the owner of land to deliver a warranty deed therefor before a certain date, but contains no mention of a covenant against liens and incumbrances, will be held to have agreed to take the land subject to such liens and incumbrances as were in existence at the time the contract was made, and the seller is entitled to receive the full amount named in the agreement without deduction for liens and incumbrances. 238.

In such a case a husband who did not sign the agreement to sell is entitled to his contingent right of dower in the land sold. 238.

CREDITS—

Have their situs at the residence of the owner. 106.

CRIMINAL LAW—

Competency of testimony as to a previous arrest of the defendant; relevancy of previous conduct and acts; intent may be inferred from other acts than that charged in the indictment. 74.

Complaint of misconduct on the part of the prosecuting attorney in his argument to the jury; election between counts. 74.

In his argument to the jury a prosecuting attorney is at liberty to express his belief in the guilt of the accused, where such belief is based on evidence presented during the trial. 129.

Where a question of misconduct in argument is raised, the statements complained of should be brought into the record "as made" and not in substance. 129.

A verdict in a criminal case, except where first degree murder is charged, recommending mercy will be treated as surplusage where responsive to the indictment. 129.

Where a prisoner is sentenced to a certain workhouse and during the term of incarceration the county commissioners abrogate the contract with that work-house and arrange for incarceration of prisoners in another work-house, the court is without authority to modify its judgment by making a finding as to amount of fine and costs remaining unsatisfied, but the sheriff has authority to transfer the prisoner. 333.

A common pleas court has no authority to modify its judgment after expiration of the term at which it was entered, except as provided by statute. 333.

Guilt knowledge a necessary el-

ement in a prosecution for receiving stolen goods; competency of evidence as to previous acts of the same character. 380.

A fine of \$200 for a first offense under the statute relating to the tagging of articles received at second hand stores and junk shops is grossly excessive. 382.

Construction of the statutory requirement that a junk dealer attach a tag "to such article in some visible or convenient place." 382.

A defendant can not be heard to complain where a verdict of homicide has been returned against him for a less degree than that charged in the indictment. 378.

For the purpose of determining whether a venireman summoned in a first degree murder case is a fit subject for per-emptory challenge, questions as to his views with reference to a recommendation of mercy are proper. 465.

CROSSINGS—

Construction of crossings over railways, see railways. 40.

CUSTODY OF CHILDREN—

Orders pertaining to the custody of children may be made by a court of equity. 128.

DAMAGES—

Failure to allege malice in an action for assault probably does not bar an award of exemplary damages. 30.

Measure of, where the holder of a leasehold is dispossessed by foreclosure proceedings. 337.

DEFENSES—

The defense of payment of a promissory note is not authorized under a general denial. 455.

DEPOSITIONS—

The officer before a deposition is taken must transmit it to the clerk of court; a deposition when taken becomes, whether filed or not, an official document under control of the court, and may be used by

either party according to its competency or relevancy. 430.

DISCRETION—

Of a board of education in the matter of selection of a school site. 365.

In the matter of sentence. 382.

Of a trial judge as to whether a judicial sale should be confirmed. 398.

Of a trial judge in the matter of setting aside a judgment during the term at which it was rendered. 591.

DIVORCE AND ALIMONY—

A judgment of dismissal of an action for divorce without a full hearing is subject to review. 295.

No divorce can be granted for wilful absence where the separation was justified so far as the accused was concerned, and a decree for separate maintenance constitutes such justification. 295.

A divorced wife is not entitled to dower in lands acquired by her husband after termination of the marriage relation. 475.

Full faith and credit is given in this state to a decree of divorce granted in another state, and a transcript of such decree is admissible in evidence as proof of its rendition. 475.

A wife who has separated from her husband on account of his aggression and has become a resident of this state is entitled to the benefit of the divorce laws of this state; non-resident husband bound by such a decree in other states. 481.

Decree making a division of the husband's property distinguished from an allowance of alimony; an allowance of a monthly sum for an indefinite time, if neither fixed or ascertainable, is not a share of the husband's estate. 545.

Where a divorce has been granted for the aggression of the wife, the court may transfer to her property, real and personal, owned by the husband at the time of the

decree, but may not grant alimony based on future personal earnings of the husband. 545.

Whether a decree constitutes an order for payment of alimony or a share of the husband's estate is to be determined from the legal effect of the entry as a whole. 545.

An order for payment of alimony may be modified upon a showing of changed circumstances or conditions. 545.

An order which it was not within the power of the court to make may be attacked collaterally in a proceeding in contempt to enforce it. 545.

DISMISSAL—

Where the prayer of a petition is for a money judgment only against one defendant, with an alternative prayer for equitable relief against the other defendants, and the defendant against whom a money judgment is sought waives a jury, such defendant can not thereafter withdraw the waiver of a jury and insist upon a trial merely because the court dismissed the other defendants from the case. 177.

Review by a proceeding in error of the dismissal of certain defendants does not serve to either prevent or delay continuance of the trial, or a judgment against a defendant not dismissed, or a review of such judgment by error proceedings. 177.

DITCHES—

The provisions of Section 6517 are cumulative and are intended to afford petitioners for the alteration and repair of ditches an additional remedy after refusal by the township trustees to act. 1.

Procedure for the alteration and repair of ditches; jurisdiction of county commissioners; not dependent on refusal of township trustees to act; improvement and repair of ditches located in part on the line of a township ditch. 1.

DOWER—

Contingent right of dower may be recovered by one entitled thereto who did not sign the agreement to sell or agree thereto. 238.

A divorced wife is not entitled to a dower in lands acquired by her husband after termination of the marriage relation. 475.

EDUCATIONAL INSTITUTIONS

Gifts in trust for purposes of education are within the rules governing charitable trusts and should be liberally construed. 161.

Action of the trustees of Cincinnati University in making good to professors and trustees loss of salary from entering the military service upheld. 161.

The propriety of expenditures in carrying on a university must be determined in view of the facts and conditions which exist at the time. 161.

ELECTRIC COMPANIES—

Are not insurers of persons who come in contact with charged wires through their own fault; high degree of care required in the handling of an electric current, but trespassers are without recourse if shocked. 170.

EMINENT DOMAIN—

In appropriation of land for road purposes the burden of proving value is on the property owner. 351.

In an appropriation of land for road purposes error does not lie to failure of the certificate to set forth the necessity of the appropriation or the purpose for which the land is wanted. 351.

A foreign railway company appropriating land in this state need not prove that the laws of the state in which it was organized confer the right of eminent domain upon it. 65.

EMPLOYMENT—

Termination of contract of, be-

cause of misconduct of employee causing injury to employer's business. 241.

ERROR—

Can not be based on failure of a trial judge to apportion among a number of defendants the amount of the reduction made by him *sua sponte* in the verdict. 24.

May be prosecuted in a contempt proceeding where there has been a finding of not guilty. 128.

Where there have been two journal entries, the first merely a finding in favor of the plaintiff and a fixing of the amount of damages, and the second disposing of a motion for a new trial and in its terms a formal judgment entry in all respects except that it does not contain the amount to be recovered, the second is the one from which the filing of the petition in error must date. 177.

The court of appeals is without power in an error proceeding to consider the weight of the evidence in a personal injury case where a directed verdict was returned for the defendant and no motion for a new trial was filed within the statutory time. 541.

EVIDENCE—

A question to a witness is not improper, as tending to impeach a witness previously called by the same party, merely because the answer might incidentally reflect upon such other witness, when. 7.

Proof required where a foreign railway company seeks to appropriate property in this state. 65.

The legislative acts of a sister state may be proved in this state, how. 65.

Competency of evidence in a receiving stolen goods case of previous acts of the same character. 380.

Depositions are available for the use of either party, subject to competency and relevancy. 430.

The statement of an injured man to his physician eight months af-

ter the injury is not a part of the *res gesta* and not admissible in evidence in an action for the injury. 460.

A decree of divorce granted in another state is admissible in evidence in the courts of this state. 475.

EXECUTOR—

See ADMINISTRATOR.

EXEMPTION—

Wife not entitled to out of proceeds from foreclosure of a chattel mortgage executed by the husband. 583.

GAS COMPANY—

A franchise under which gas has been furnished to a village and its inhabitants for a specific term becomes an indeterminate franchise upon expiration of the term; company not bound to furnish gas under such a franchise, but if it elects so to do it must be sold at the old rate. 283.

Adoption of a second or third ordinance, granting a renewal of the first ordinance but on different terms, does not repeal the first ordinance by implication and does not become binding upon the company until accepted by it. 283.

Where the gas company has not accepted the terms fixed in a second ordinance, it is at liberty to terminate its service and remove its property at any time and an action does not lie to enjoin discontinuance or impairment of the service. 283.

Can not be compelled to continue service under a new franchise which it has not accepted; a second ordinance does not repeal the former one by implication. 293.

GIFTS—

Requisites to a complete gift *inter vivos*; intention of the donor; delivery; acceptance by donee; burden of impeaching a completed gift. 312.

GOOD FAITH—

In setting up a groundless counter-claim. 92.

GUARDIAN AND WARD—

A ward may summon a surety on his guardian's bond into court before the amount of the default has been determined; application of the ten years statute. 522.

GUARD RAILS—

Along the lines of streets and areas where the level is above that of the street. 24.

HOMICIDE—

Under an indictment for murder in the first degree, where the crime was committed by poison, it is competent for the jury to return a verdict of murder in the second degree. 378.

HOTEL—

The proprietor of a hotel and a bar connected therewith owes to a patron the duty of exercising ordinary care to protect him from assault by another patron or by an employee, and is liable for damages resulting from such an assault, if by the exercise of ordinary care it could have been prevented. 14.

HUSBAND AND WIFE—

A wife can not be said to be "willfully absent" from her husband, when she is living apart from him after obtaining a decree of court for separate maintenance. 295.

An ante-nuptial contract providing for support of the wife during coverture, with no interest in property owned by the husband at the time of the marriage in the event they should cease to live together as husband and wife does not bar her from being awarded reasonable alimony. 497.

When a wife is justified in separating from her husband on account of his aggression, she may lawfully select and acquire a residence separate from his. 481.

If the wife remove into this state and acquire a lawful residence here, she is entitled to the benefit of our divorce laws, although her husband was during coverture and still is a resident of another state. 481.

Such a decree is binding in this state upon both husband and wife and may be given such efficacy in other states as comity and their own conception of duty and public policy require. 481.

Authority of a court to make division of the husband's property where a divorce has been granted on the aggression of the wife. 545.

A wife is not entitled to \$500 in lieu of homestead out of proceeds of sale under foreclosure of a chattel mortgage executed by the husband on his property. 583.

INDUSTRIAL COMMISSION—

See WORKMEN'S COMPENSATION.

Finding that pneumonia caused by the breathing of poisonous gases by a workman in the course of his employment is not an occupational disease. 415.

In an appeal from the rejection of a claim by the Industrial Commission, the ground of the rejection need not be set forth in the petition. 460.

INFANT—

See CUSTODY OF CHILDREN.

Illegal employment of; knowledge of the employer as to non-age of the infant. 342.

INJUNCTION—

Against the use of high power explosives. 153.

Does not lie against the levy of a tax on a consolidated school district for payment of indebtedness contracted by a district which has been transferred to the consolidated district. 63.

Ground for; insolvency of defendant; sufficient remedy at law. 80.

In proceedings for punishment of a defendant charged with viola-

ting an order of injunction, Sections 11887 and 11888 are the proper statutes to apply. 252.

Proof of an intention to violate an injunction is not material where the injunction has been actually violated. 252.

Lies upon petition of a landowner where affected by an attempt to divide the waters of a stream illegally. 395.

Lies to prevent injury to the lateral support of an underground mine by stripping. 401.

INNKEEPER—

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INSANE—

The statutory requirement that patients in hospitals for the insane must pay for their support when able so to do is not unreasonable but is a valid enactment. 188.

INSURANCE—

Section 9391, relating to misrepresentations by an applicant for insurance, is applicable to accident insurance. 556.

INSURANCE, ACCIDENT—

Indemnity from bodily injury through accidental means resulting directly, independently and exclusively of all other causes. 257.

Voluntary exposure to cold in the ordinary course of every day duty is not a bar to recovery under an accident policy covering "freezing," where the result of the exposure was wholly unexpected and did not follow the usual effect of a known cause. 257.

INSURANCE, FIRE—

A policy does not become void, under the general forfeiture policy relating to a change of interest or title, by a sale of the property and the placing of the title in escrow. 473.

In such a case the proceeds of the policy are for the benefit of the property, and if payment thereof is made to the vendor it is for the benefit of the vendee in the event

he complies with the terms of the escrow agreement. 473.

In an action by a vendee to recover insurance money paid to the vendor while the deed was in escrow, a court may render judgment on the pleadings in favor of the vendee. 473.

INTENT—

May be inferred from other acts than that charged in the indictment. 74.

INTOXICATION—

Whether an intoxicated person who was struck by a street car was capable at the time of the accident of exercising ordinary care is a question for the jury. 439.

Voluntary intoxication is no excuse for failure to exercise ordinary care to avoid suffering injury. 439.

JUDGMENT—

Conclusiveness of a judgment against a defaulting contractor and his surety can not be maintained as to the surety, where the surety was dismissed from the action prior to the determination of the amount recoverable from the contractor. 321.

May not be entered on a special verdict, when. 455.

The setting aside of a judgment during the term it was rendered is within the discretion of the trial judge, and not subject to review except upon a showing of abuse of discretion. 519.

Not an abuse of discretion to set aside a judgment entered in the absence of the defendant, notwithstanding there is little merit in his excuse for absence. 591.

JUDICIAL SALES—

Confirmation is within the discretion of the trial judge; an abuse of discretion not shown by the fact that one or more of the reviewing judges would have acted differently in the premises. 398.

JUNK SHOPS—

Regulation of dealers in second hand articles; reasonable compliance with the statutory requirement having reference to the tagging of articles purchased; discretion in the matter of sentence. 382.

JURISDICTION—

To divide a living stream into two channels. 305.

Where a decree of the court of appeals fixes rates for gas with provision for a modification should it be shown to be necessary. 362.

Of the probate court to reduce the bond of the trustees where the interest of the estate is promoted thereby. 593.

JURY—

The waiver of, can not be withdrawn on the ground that the court subsequently dismissed other defendants from the case. 177.

In the examination on their *voir dire* in a first degree murder case veniremen may be questioned as to their views as to a recommendation for mercy. 465.

KNOWLEDGE—

On the part of an employer of the non-age of an employee claiming to be over sixteen is necessary in order to render the employer guilty of a misdemeanor in connection with such employment, but is not necessary to render him liable in an action for injuries suffered by the minor. 342.

LANDLORD AND TENANT—

Where on account of some disagreement with the landlord leased premises are abandoned before duly occupied, the lessee is liable for rent until a new tenant is found. 12.

Taking possession under a defectively executed lease or a lease void for any reason, creating a tenancy for one or more years with rentals payable monthly, creates a tenancy from month to month only. 193.

Where a building is leased for a purpose requiring alterations, with a provision that upon surrender it shall be left in as good condition as before the alterations were made, the lessee is not bound to restore the building to its condition before the alterations were made, but is only required to leave it in as good condition as it was at the beginning of his term. 193.

A tenant in possession with an implied covenant for quiet enjoyment, upon being dispossessed by foreclosure and sale of the premises, is entitled to compensation out of the proceeds, and his claim is prior to that of mortgagees and holders of liens executed subsequent to the lease. 337.

The measure of compensation in such a case is the difference between the rent reserved in the lease and the actual net value of the leasehold estate reduced to its present worth. 337.

Duty of a lessee to shut off water on floor occupied by him. 412.

LAST CHANCE—

See NEGLIGENCE.

LATERAL SUPPORT—

Of an underground mine; injury to by stripping may be enjoined. 401.

LEASE—

See LANDLORD AND TENANT.

LEGACY—

Vesting of; death of the legatee before distribution. 49.

LIBEL AND SLANDER—

Printed words of ridicule or contempt, relating solely to political views or arguments on questions of public interest, which tend merely to lessen a man in public esteem or to wound his feelings, are not actionable without proof of special damage. 599.

LIENS—

Priority as between a judgment obtained by an injured employee

and a claim for material furnished to his employers under pledge of the proceeds of the contract. 33.

As between an unpaid seller of goods and a subsequent purchaser before the filing of a mortgage in the recorder's office. 551.

LIENS, MECHANICS—

One who has furnished material for a building to a general contractor and has filed a lien within the statutory time and served notice thereof upon the owner will not be deprived of his lien because of failure to furnish the notice required by Section 8313. 72.

The owner of the building must require affidavits. 72.

Service on owner of a carbon copy of the affidavit to obtain a lien is sufficient, when. 399.

Prior to enactment of the mechanics lien law no privity existed between the owner and a sub-contractor, and an action could not be maintained by a sub-contractor against the owner for labor and material. 566.

Effect of sub-contractor's failure to file notices; he may establish a lien on material furnished direct from his workshop or factory; effect of omission of name of materialman from affidavit; irregularity in form of affidavit. 566.

LIMITATION OF ACTIONS—

Application to the statute to actions for recovery of misappropriated funds. 353.

Application of the ten years' statute in the case of the surety of a defaulting guardian. 522.

LYNCHING—

An act of violence directed against a workman by strikers is a "lynching." 391.

MANDAMUS—

Is the proper form of action to compel payment of claim due

from a public board or officers under an executed contract which fixes the amount to be paid. 249.

A county auditor may be compelled to issue his warrant to a tax inquisitor in payment of percentage on taxes collected on omitted property, when; county commissioners not necessary parties to such an action, when. 249.

Degree of care required by a land owner for the safety of employees of an independent contractor who are rightfully on the premises. 225.

MASTER AND SERVANT—

Presumption that chauffeur was acting within the scope of his employment and about his employer's business at the time of the accident complained of. 385.

The burden of proof as to assumption of risk is on the employer. 513.

Knowledge of the non-age of an employee is not necessary to make the employment illegal for the purpose of a suit for injuries sustained by such employee or under an indemnity policy referring to illegal employment. 342.

Under the workmen's compensation law an employer and employees are strangers to each other in so far as the doctrine of *res ipsa loquitur* is concerned. 219.

MIAMI CONSERVANCY DISTRICT—

Appeal by land owner from appraisal of benefits; burden of proof. 17.

MINES AND MINING—

Injury to the lateral support of an underground mine by stripping may be enjoined. 401.

MISCONDUCT—

Alleged against a prosecuting attorney in his argument to the jury. 74.

May not be based on declarations by a prosecuting attorney to

the jury of his belief in the guilt of the accused, when. 129.

How the question of alleged misconduct may be raised on review. 129.

Alleged against a prosecuting attorney in his argument to the jury. 74.

MOB—

What constitutes a mob; definition of lynching; liability for mob violence not limited to persons in custody for crime. 391.

MORTGAGE—

Where subsequent to a lease the claim of the lessee for damages on account of being dispossessed by foreclosure has priority upon distribution of the proceeds. 337.

A mortgage executed by a corporation other than a railway company, which purports to include "all after-acquired property" of the mortgagor, is not a prior lien as against subsequent mortgages or lien holders who obtained their liens without actual notice of such "after-acquired" clause. 605.

MUNICIPAL CORPORATIONS—

Whether an ordinance requiring guard rails along street lines and areas above the level of the street applies to a passage permissively used across a vacant lot from a street to an alley is a question for the jury. 24.

Where a street railway company voluntarily abandons its line, the parties to whom the rails and ties are sold for junk may be required to give bond for restoration of the streets to normal condition; implied obligation of a traction company to keep the streets which it uses free from nuisance. 81.

The provisions of the contract embodied in an ordinance granting a franchise to a traction company will be construed in a manner favorable to the municipality. 81.

A municipal court is a statu-

tory and not a constitutional tribunal where created by a city charter supplemented by an act of the General Assembly, and authority to appoint its clerk is vested in the appointing officer prescribed by the charter. 117.

A second ordinance fixing terms of service by a gas company, which has not been accepted by the company, does not repeal the former ordinance by implication. 283.

A gas company may not be compelled to continue service under a new ordinance which it has not accepted. 283.

Construction of the statute requiring that certain municipal advertising be published in papers of "opposite politics." 273.

An action does not lie against a municipality for injuries received by a pedestrian on a defective sidewalk, where the testimony shows that the one injured was fully aware of the condition of the walk and attempted to pass over it regardless of the danger. 319.

Ordinances of the city of Cleveland providing the degree of care to be exercised by motormen in operating their cars declared void for uncertainty and also because providing a different degree of care from that established by general law. 369.

May fix a minimum weight for loaves of bread manufactured and sold by bakers. 487.

Necessary declaration by council in ordering a public improvement; when necessary to declare that it will conduce to the public health, convenience and welfare. 536.

Approval of specifications, plans and estimates; discretion in the letting of contracts; alternative bids on different materials; authority of council in fixing the amount of bonds to be issued for an improvement to limit other expenditures. 536.

NEGLIGENCE—

At a railway crossing; duty of railway company in operation of its trains, and of the public in the use of the crossing; one not aware he is approaching a crossing not excused from looking and listening; company not responsible for obstruction of view by weeds, brush and trees not on its right-of-way; instruction to jury. 97.

Contributory negligence can not be charged against a street car passenger who was thrown and injured by the premature starting of the car from which he was attempting to alight at a regular stop for the discharge of passengers. 125.

Conductor must know all passengers are in places of safety before signaling the motorman to start. 125.

There may be more than one proximate cause of an injury. 150.

Where concurrent causes are the immediate and efficient cause of the accident, one of them can not be considered without considering the other. 150.

Where a waiting passenger is struck by the projecting rear end of a street car rounding a curve at a prohibited rate of speed and is thrown against a second waiting passenger who is injured, it is error to take from the jury an action by the latter for injuries. 150.

A high degree of care is required of those handling electricity, but electrical companies are not insurers against injury to persons coming in contact with charged wires through their own fault; trespassers without recourse if shocked. 170.

Actionable negligence is not shown on the part of an electric light and power company in the case of a boy found dead at the foot of a pole carrying charged wires under permission of the municipal authorities. 170.

The taking away by the workmen's compensation act of the defenses of the fellow-servant rule, contributory negligence and assumption of risk does not enlarge the basis of recovery on the ground of negligence beyond what existed at common law, and the employer is only required to exercise ordinary care under all the circumstances of the case. 203.

The test of liability under the workmen's compensation act is whether the employer exercised the degree of care which ordinarily prudent persons are accustomed to exercise under the same or similar circumstances. 203.

Where a petition contains two allegations of negligence, but no evidence is offered in support of one of them, it is error to submit both questions to the jury. 203.

Application of the *res ipsa loquiter* doctrine under the workmen's compensation law. 219.

A land owner owes to an employee of an independent contractor, who is rightfully on his premises, the duty of ordinary care not to injure him. 225.

The negligence of plaintiff, to bar relief, must proximately cause the injury. 225.

Employee sent to repair the windows of a factory is injured by a traveling crane. 225.

Invalid municipal provision as to the degree of care to be exercised by motormen in the operation of street cars. 369.

Evidence warranting the inference that the chauffeur whose machine caused the accident was acting within the scope of his employment. 385.

By a lessee in permitting water to overflow sink and run through floor upon tenant on the floor below; duty of tenant of upper floor to use ordinary care to prevent such an occurrence. 412.

All persons are required to exercise ordinary care in the avoid-

ance of danger, and voluntary intoxication is no excuse for failure to perform such obligation. 439.

It is a question for the jury whether one injured by a street railway car while under the influence of liquor exercised or was capable of exercising ordinary care. 439.

One who remains on a street railway track with full knowledge of the approach of an electric car is guilty of contributory negligence to such a degree as to bar recovery. 439.

The doctrine of the "last clear chance" is applicable only where the injured party could have been seen in time to have avoided the accident. 439.

The issue of contributory negligence, where presented by either the pleadings or the evidence, or both, should be submitted to the jury under proper instructions by the court. 439.

Workman injured by the bursting of an emery wheel which was not covered with a hood such as is required by statute to prevent dust from rising; whether the absence of the hood was the proximate cause of the injury held to be a question for the jury. 506.

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Qualifications for publishing municipal advertising where the statute requires papers of opposite politics. 273.

NEW TRIAL—

Where no motion for a new trial is filed within the statutory time the court of appeals is without jurisdiction to consider the evidence supporting a judgment on a directed verdict for the de-

fendant in a personal injury case. 541.

NUISANCE—

If a business can not be carried on without making it so offensive as to deprive others of the enjoyment and use of their property, a court will enjoin a continuance of the business. 252.

Proceedings in contempt for violation of an injunction against the continuance of a nuisance 252.

The holder of a legal title for the purpose only of securing an indebtedness is not liable for a claim for damages on account of a nuisance, the existence of which was unknown to said holder and the claim for which has been settled by the municipality. 572.

OPTION—

On real estate; holder can not maintain suits against a third party for breach of contract of purchase where no deed has been tendered 494.

PARTIES—

In an action in mandamus by a tax inquisitor for recovery of percentages due under an executed contract, the county commissioners are not necessary parties. 249.

In an action by an executor to quiet title, heirs of the testator are not necessary parties. 358.

Joint obligors on a guaranty are parties united in interest within the meaning of Section 11256.

PASSENGER—

See Negligence.

PAY-PATIENT LAW—

The statute requiring that patients in hospitals for the insane shall pay for their accommodations when able so to do is a valid enactment. 188.

PERSONAL INJURIES—

Effect on an action for injuries

sustained of a release executed by the injured man. 433.

A void release is without effect, but a voidable release must be set aside before an action for damages can be brought. 433.

PHYSICIAN AND SURGEON—

Malpractice based on failure to remove a drainage tube; statute of limitations began to run at the time of the negligent failure to remove the tube and not from the date of the operation. 173.

The act providing for registration for the practice of medicine in the limited branches is a constitutional enactment. 449.

PLEADING—

It is a fundamental rule that a general demurrer to any pleading, containing two or more causes of action or defenses, can not be sustained if any one cause of action or defense therein is well pleaded. 321.

Indefiniteness and uncertainty in a petition is waived by the filing of an answer, and can not be made the basis for directing a verdict for defendant at the close of plaintiff's evidence. 412.

A general denial in an action on a promissory note does not authorize proof of payment of the note. 456.

POISONING—

Verdict for murder in the second degree permissible, 378.

POLICE POWER—

Not an unreasonable exercise of, to require registration for the practice of medicine in the limited branches. 449.

The fixing of the minimum weight of loaves of bread may be manufactured and sold by bakers, is a proper exercise of the police power by a municipality. 487.

PRESCRIPTION—

It is not necessary to acquisition of a right of way by prescription that the occupancy be under color of the title. 580.

Possession of a right-of-way which was not permissive but continuous, open, notorious and exclusive, is necessarily adverse. 580.

PRESUMPTION—

As to whether a chauffeur was acting within the scope of his employment at the time of injury caused by his machine. 385.

As to the regularity of the action of a trial court in purging a verdict of excess by remittitur. 529.

PRIORITY—

Priority of a judgment in favor of an injured employee of contractors as against a claim for material furnished to the contractors under a pledge of the proceeds of the contract. 33.

PROHIBITION—

Provision in a contract that it should become void in the event the state went "dry"; became effective on the date prohibition went into effect and not on the date the amendment making traffic in intoxicating liquor unlawful was adopted. 445.

PROMISSORY NOTE—

It is the province of the jury to determine the amount recoverable on a promissory note, and the trial court is not authorized to calculate the sum due and enter judgment therefor. 455.

A general denial in an action on a promissory note does not authorize proof of payment. 455.

PROSECUTING ATTORNEY—

Not misconduct for a prosecuting attorney to express in his argument to the jury his belief in the guilt of the defendant, where the belief so expressed is based on evidence which the jury have heard. 129.

PROXIMATE CAUSE—

See NEGLIGENCE.

May not be determined by the court without the facts where the

issue is made by the pleadings. 506.

PUBLIC FUNDS—

Actions for recovery of, where wrongfully paid out; such actions accrue when report by state officials is filed; statutes of limitation do not begin to run until such filing. 353.

RAILWAYS—

Not compelled to construct crossings for abutting owners, when; farm and not industrial crossings contemplated by the statute; presumption of the tract into two unconnected parcels was made when the right-of-way was acquired. 40.

The liability of a railway company for loss or injuries along its line is limited to what occurs on its right-of-way, and the cost of herding cattle pastured along an unfenced stretch of railway in order to prevent their being injured by trains can not be recovered by an abutting owner. 44.

A new railway company may be organized by officers and employees of an existing company. 65.

Precautions required of the public in using a railway crossing. 97.

Where full fare was paid but owing to misrouting by the company's agent an increased fare is due under the traffic rules such increase is not collectable. 145.

May be assessed the costs and the landowners attorney's fees in cases of abandonment of appropriation proceedings. 500.

Shipment lost to consignee through misdelivery; liability of carrier therefor may not be limited to value at shipping point, including freight charges, when. 561.

Acquisition of a right-of-way by prescription; possession where continuous and notorious is necessarily adverse; to constitute

abandonment there must be non-user with intention to abandon; removal of main tracks to another right-of-way not an abandonment where the old right-of-way continues to be used for storage of cars, access to certain yards, etc. 580.

REAL ESTATE—

Possession of an option does not entitle the holder to enforce a contract for purchase where no deed has been tendered to the proposed purchaser. 494.

RECEIVER—

Does not take title to a note purchased from the payee after the purchase was made in good faith for value and the note did not pass into possession of the payee. 478.

RELEASE—

A void release from any claim for damages for injuries is without effect, but a voidable release must be set aside before an action of the injuries suffered can be brought. 433.

REMEDY—

Where a statute relates to a remedy, the law of the place where the court sits governs. 556.

RES ADJUDICATA—

When a matter has been finally determined by a competent tribunal in an action on the same claim and between the same parties, the judgment becomes conclusive and is a bar to the litigation of new questions which might have been presented in the first instance. 292.

It having been determined in due course by a competent tribunal that the statute of limitations had run, the same claim can not be again litigated on the new theory of a continuing and subsisting trust. 292.

RES IPSA LOQUITUR—

Under the workmen's compensation law an employer and employee are placed in the position

of strangers to each other so far as the *res ipsa loquitur* is concerned; but if attempted explanations by the defendant as to the cause of the accident are unsatisfactory, the jury may find for the plaintiff by applying *res ipsa loquitur* doctrine. 219.

ROADS—

Appropriation of land for; verdict may be returned by three-fourths of the jury; burden of proof as to value of the land taken; necessity and purpose of the appropriation need not be set forth in the certificate. 351.

SALES—

Representations by the seller as to the soundness of the horse sold amount to an express warranty, when. 510.

SCHOOLS—

In transferring an existing school district to an adjacent rural school district an agreement that the territory so transferred shall be relieved from payment of its outstanding indebtedness is without authority of law and the levy of a tax upon the consolidated district for the payment of such claims can not be enjoined. 63.

A county board of education is a creature of statute, and the exercise of the powers granted to it is limited to those expressly given or contained by reasonable intendment in the act creating it. 305.

A county board of education is not authorized to transfer vacant property, its power in that respect being limited to inhabited property. 305.

There is no provision under the present school code of Ohio for what were formerly known as sub-districts, and a sub-district school is now without authority of legal existence. 302.

Provisions must be made for transportation of all pupils of

legal school age who reside in the territory of a suspended school and live more than two miles by the nearest traveled highway from the nearest school to which they have been assigned. 302.

Exercise of the power to select school sites, vested in boards of education, will not be interfered with by reviewing courts in the absence of a showing of fraud, collusion or an abuse of discretion. 365.

Representations made by a board of education at the time a bond issue was submitted to the electors for approval is not a bar to a subsequent change of site to meet the then needs of the school district. 365.

SCIENTER—

Guilty knowledge a necessary element in a prosecution for receiving stolen goods. 380.

SECOND HAND DEALERS—

See JUNK SHOPS.

SHERIFF—

Empowered to transfer prisoners from one work house to another where necessitated by change in contract for keeping said prisoners. 333.

SIDEWALK—

Knowledge of the condition of a defective sidewalk precludes recovery for injuries received thereon. 319.

SITUS—

Of credits is at the residence of the owner. 106.

SPECIFIC PERFORMANCE—

Denied and contract for purchase and sale set aside where the title was found to be clouded by duplicity of names. 421.

Of a contract for purchase of a certain amount of beer extended over a period of five years; provision in the agreement that it should be void in the event the state went dry construed to mean that it should continue effective

up to the time the amendment rendering traffic in intoxicating liquors becomes effective. 445.

Not enforceable by the holder of an option on the property involved, no deed for which has been tendered. 494.

STATUTES—

Where a statute relates to a remedy, the law of the place where the court sits governs. 556.

STATUTES CONSIDERED—

Section 6517, relating to alteration, repair of ditches and expenses so incurred. 1.

Section 6443, investing county commissioners with authority to construct and improve ditches. 1.

Section 6452, relating to the repair of an old ditch. 1.

Section 5579, known as the Wernes law. 289.

Section 6443, empowering county commissioners to construct and improve ditches. 395.

Section 6278, defining a "mob" and "lynching." 391.

Section 11538, as to the duty of a person taking a deposition. 430.

Sections 1274-1 *et seq.*, relating to the practice of medicine in the limited branches. 440.

Section 7620, empowering boards of education to select school sites. 365.

Sections 286, 286-1, 286-2, and 286-3, relating to recovery of misappropriated funds. 353.

Section 3812 as amended and having reference to the ordering by council of a public improvement. 536.

Section 8434, relating to the lien of an unpaid seller. 551.

Section 8560, providing that a chattel mortgage shall be void unless filed. 551.

Section 9391, relating to misrepresentation by an applicant for insurance. 556.

Section 11993, relating to divorce for aggression of the wife. 545.

Section 12941, providing a penalty for violation of the civil rights statute. 589.

Section 10591, relating to the bond of a trustee under a will. 593.

STATUTE OF FRAUDS—

Section 8312 as amended, relating to failure to furnish affidavits under the mechanics' lien law. 566.

Section 8328-8 declaring that the mechanics' lien law shall be liberally construed. 566.

STREET RAILWAYS—

Conductor must know that all passengers are in places of safety before starting the car. 125.

STREETS—

Application of ordinance requiring guard rails along the line of streets and areas above the level of the street level. 24.

Obligation of a traction company to keep them free from nuisance. 81.

Where a traction company voluntarily abandons the privileges granted to it by a municipal franchise, bond may be required securing the city that its streets will be left in as good condition as before the ties and rails were removed. 81.

Assessments under the benefit plan; exact equality not always attainable; courts will not interfere by injunction unless the benefits have been substantially exceeded. 121.

An act of violence against a workman by strikers is a "lynching." 391.

SURETIES—

Whether alleged misrepresentations were of a character to avoid the bond is a question for the jury; alterations in the contract after the bond was executed are fatal to the right to recover on the bond, when; conclusiveness of a former judgment dismissing the surety from the action; direct ob-

ligation distinguished from responsibility over. 321.

Rulings in an action against the surety of a defaulting contractor. 321.

A bonding company failing to make a defense after notice is bound by the judgment rendered against the obligee. 347.

Effect of consent of a surety to payment to a contractor before due. 347.

May be haled in court by wards without first having a determination as to the amount of the guardian's default, when; application of the ten years statute of limitations. 352.

TAXATION—

Money subject to check is intangible property; what shall be considered money for purposes of taxation may be determined by the Legislature. 106.

Credits have their situs at the residence of the owner; taxability of corporate funds on deposit in another state. 106.

Duties of district assessors; authority to correct erroneous tax returns; appeal from valuations as made by district assessors; construction of the Warnes law. 289.

TITLE—

An action to quiet title may be maintained by an executor, when; heirs of the testator not necessary parties. 358.

Specific performance of purchase and sale denied where title was clouded by duplicity of names. 421.

TOWNSHIP—

Establishment of boundary line between townships. 407.

TRIAL—

Alleged misconduct on the part of a prosecuting attorney in his argument to the jury; how the question of misconduct may be raised on review. 129.

If a petition contains an allegation of negligence as to which no evidence was offered, it is error to submit the question involved in such allegation to the jury. 203.

The breaking of an elevator rope under a load which it should have borne without breaking is some evidence that the rope had become defective and is sufficient to require submission of the case to the jury. 219.

A request by both parties at the conclusion of the evidence for an instructed verdict in his favor clothes the court with the functions of a jury, and the verdict rendered will not be set aside unless clearly against the weight of the evidence. 580.

TRUST—

The probate court has authority to reduce the bond of a trustee, discharge the sureties and accept a new bond for a less amount, where such a course is in the interest of the estate. 593.

TRUST FUNDS—

Laws relating to trust funds held for purposes of education will be liberally construed, and the discretion of trustees in the expenditure of such funds will not be interfered with in the absence of a showing of abuse or fraud; facts and conditions existing at the time should guide in such expenditures. 161.

UNFAIR COMPETITION—

The copyrighting of instructions to prospective purchasers as to how measurements of certain goods should be made does not confer the exclusive right to the use of such a method in dealing with purchasers, and the use of such methods does not constitute unfair competition in the absence of any effort to palm off the goods sold by that method as those of the owner of the copyright. 113.

VERDICT—

Whether a verdict of the full jury is required in the case of an appeal by a land owner in the Miami conservancy district. 17.

Motive for fixing amount of verdict. 30.

Where reduced by the trial judge *sua sponte* and not because deemed by him to be excessive, it is an act of judicial clemency and complaint does not lie on the part of the defendants because the amount of the reduction was not apportioned among them. 30.

A recommendation of mercy, except in a first degree murder case, will be treated as surplusage where responsive to the indictment. 129.

In the absence of a general verdict, judgment should not be entered on a special verdict, unless the answers to the interrogatories submitted determine all the facts essential to the judgment without reference to the testimony. 455.

Adverse party can not complain because of elimination of excess by remittitur, when; presumption as to regularity of the action of the trial court in so doing. 529.

VILLAGE—

Gas franchise expires by limitation; company not bound to continue its service, but if it does so it must be at the old rate; passage of an ordinance renewing the franchise does not repeal the former ordinance by implication or become binding upon the company until accepted by it; injunction does not lie to restrain discontinuance of the service, when. 283.

WARRANTY—

See COVENANTS.

Of a horse sold. 510.

WATER AND WATER COURSES—

Proper procedure for dividing

the waters of a stream; provision for tributaries and laterals. 305.

WILLS—

Where the vesting of a legacy is not postponed by the will, the death of the legatee before payment does not cast the legacy back into the estate, but it becomes payable to the personal representative of the deceased legatee in the manner provided in the will. 49.

Construction of rights of son who was given no interest in his father's estate but could receive advancements from the trustees of the estate. 158.

What constitutes an interest in the estate of a decedent. 158.

WORDS AND PHRASES—

Meaning of the words "benefits" and "compensation" under the workmen's compensation act. 166.

Construction of the words "opposite politics" as used in the statute relating to municipal advertising. 273.

WORKMEN'S COMPENSATION—

See INDUSTRIAL COMMISSION.

The mere fact that a workman who was killed in the course of his employment was an employee of a concern which complies with the Ohio act does not render the Industrial Commission liable for his death, where he was not hired in Ohio, or employed to work in Ohio and his injury and death occurred outside of the state. 7.

The workmen's compensation law may have some extra territorial operation. 7.

The fact that a workman killed in the course of his employment had contracted a bigamous marriage does not bar the claim of his lawful wife. 7.

In a case arising by way of appeal from the decision of the Industrial Commission denying the right of a claimant to participate in the state insurance fund, a jury is without power to return

a verdict fixing compensation to be paid in a lump sum. 7.

Priority of a judgment against contractors obtained by an injured employee as against a claim for material furnished under pledge of the proceeds of the contract; legality of an assignment of the proceeds. 33.

Award of, not invariable for impairment of earning capacity. 166.

Where an injured employee is receiving compensation on account of impairment of his earning capacity, the Industrial Commission is not justified in determining that such impairment has ceased because his earnings are again equal to those received before his injury, where this is due to the great increase in the scale of wages and except for his injury he would now be receiving much greater wages than are being paid to him. 166.

"Benefits" and "Compensation" under the workmen's compensation law distinguished. 166.

What constitutes the test of liability under the workmen's compensation act; only ordinary care required of an employer. 203.

Application of the doctrine of *res ipsa loquitur* under the workmen's compensation law. 219.

Widow of one who died of pneumonia resulting from the breathing of poisonous gases while in the course of his employment not entitled to compensation for death from an occupational disease, but she may recover for death from an accidental cause. 415.

The question of the mental capacity of an injured man to execute an application for compensation from the state insurance fund is one of fact for the jury under proper instructions from the court. 433.

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